

# **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**No. 439**

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**JACKSON D. MAGENAU, ADMINISTRATOR OF THE  
ESTATE OF NORMAN ORMSBEE, JR., DECEASED,  
PETITIONER,**

**vs.**

**AETNA FREIGHT LINES, INC.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**PETITION FOR CERTIORARI FILED OCTOBER 13, 1958  
CERTIORARI GRANTED JANUARY 12, 1959**

# TABLE OF CONTENTS

	PAGE
APPENDIX:	
I. Docket Entries .....	1a
II. Complaint .....	5a
III. Answer .....	9a
IV. The Evidence:	

## PLAINTIFF'S EVIDENCE

	DIR.	CR.	RED.	REC.
William Balchunas .....	11a	20a	26a	
Donald W. Mahoney .....	27a	31a		
Herbert L. Brown .....	33a	39a	43a	44a
Charles Jones .....	46a	49a	59a	
Adelbert Rice .....	61a			
Norman Ormsbee .....	71a	78a		
Joan Ormsbee .....	85a	88a	107a	
Motion for Compulsory Nonsuit .....				108a
Ruling .....				119a

## DEFENDANT'S EVIDENCE

	DIR.	CR.	RED.
Donald W. Mahoney .....	45a		
Daniel Fidler .....	120a	126a	131a
Adelbert Rice .....	133a	137a	
Rodhy Roberts .....	139a	153a	158a
Requests for Instructions .....			160a

V. Charge of the Court .....	177a
Verdict .....	199a
Jury's Answer to Interrogatories .....	199a
VI. Order for Judgment .....	201a



VII. Motion for New Trial .....	202a
VIII. Motion for Judgment in Accordance With Motion for Directed Verdict .....	205a
IX. Order .....	206a
X. Opinion .....	207a
Order .....	225a

	Original	Print
Proceedings in U.S.C.A. for the Third Circuit	227	227
Stipulation re extending time for filing of appel- lant's brief and appendix and order thereon	227	227
Motion to strike off appellant's reply brief and de- nial thereof	228	228
Opinion, Goodrich, J.	229	229
Judgment	235	233
Order denying petition for rehearing	238	234
Order staying issuance of mandate	240	234
Clerk's certificate (omitted in printing)	241	234
Stipulation re extending time for staying mandate	242	235
Order further staying issuance of mandate	243	235
Order allowing certiorari	244	236

**APPELLANT'S APPENDIX**

**No. 433 C. A. Erie**

**Jackson D. Magenau, Administrator of the Estate of  
Norman Ormsbee, Jr., deceased**

**vs.**

**Aetna Freight Lines, Inc.**

**I.**

**DOCKET ENTRIES**

**1956**

**May 29, Complaint filed.**

**May 29, Summons issued.**

**June 14, Praecipe for Appearance filed by Gerald J. Weber,  
Esq. and Fred Coope, Esq. for defendant.**

**June 14, Stipulation for extension of time to file answer  
filed.**

**June 19, Summons returned served June 1, 1956.**

**June 19, Order entered granting above stipulation. (Will-  
son, J.)**

**July 16, Answer filed.**

**July 17, Praecipe filed requesting case to be placed on  
trial list.**

**Sept. 18, Answer to Interrogatories of the Plaintiff filed.**

*Docket Entries*

1957

Apr. 4, Notice of Depositions filed with Certificate of Service thereon filed by plaintiff's attorney.

Apr. 4, Motion for Summary Judgment; Notice of Motion and Certificate of service filed.

Apr. 4, Deposition of A. W. Rice filed.

Apr. 4, Depositions of Charles Jones, Joan Ormsbee, Thomas Palos, Vera Palos, and Herbert Brown filed.

May 17, Answers to Defendant's Request for Admissions filed.

May 22, Hearing on Pretrial conference and Argument on Motion for Summary Judgment before Willson, J., Erie, Pa.

May 22, Hearing concluded. Hearing memo filed. Helen Smith, Reporter)

May 27, Stipulation Re: Jurors filed.

May 27, Order of Court entered. Defendant's Motion for Summary Judgment is denied. (Willson, J.)

May 27, Trial opens before Willson, J. and Jury.

May 28, Trial continues.

May 29, Trial continues.

May 29, Trial concluded. Trial memo filed. H. Smith, reporter.

June 3, Order of Court entered directing the Clerk to enter judgment in favor of the plaintiff Jackson D. Magenau, administrator of the Estate of Norman Ormsbee, Jr., deceased, in the sum of \$76,400.00 and against the Aetna Freight Lines, Inc. together with costs. (Willson, J.)

*Docket Entries*

3a

- June 3, Pursuant to the above order, judgment is hereby entered in favor of the plaintiff, Jackson D. Magenau, Administrator of the Estate of Norman Ormsbee, Jr., deceased, and against the Aetna Freight Lines, Inc., in the sum of \$76,400.00 and costs. James H. Wallace, Jr., Clerk. J. ent. 6/3/57.
- June 3, Notices mailed.
- June 5, Motion for judgment in accordance with Motion for Directed Verdict filed.
- June 5, Motion for New Trial filed by defendant.
- June 5, Motion for Stay of Proceedings filed.
- Oct. 24, Transcript of Pretrial conference before Willson, J. on 5/22/57 at Erie, Pa. filed by Rep. H. Smith.
- Oct. 24, Volumes 1 and 2 of the Transcript of Proceedings at trial commencing 7/27/57 at Erie, Pa., before Willson, J. and a Jury filed by Rep. H. Smith in Pittsburgh Office 10/21/57.
- Oct. 28, Bond in Amount of \$66,400.00 plus all costs and damages filed.
- Oct. 29, Bond in Amount of \$10,000.00 filed. (Was in Pgh. file.)
- Nov. 6, Hearing on Motion for New Trial; Motion for judgment; Motion for stay of proceedings begun and concluded C. A. V. Trial memo filed. All Motions taken under advisement.
- Nov. 15, Order of Willson, J. entered denying (1) Motion for Judgment N. O. V. (2) Motion to vacate and set aside verdict and (3) Motion for New Trial. A formal opinion setting forth the Court's reason for this order will be filed in due course.

*Docket Entries*

- Dec. 10, Opinion and Order of Willson, J. denying Motion for new trial. (Signed and filed in Pittsburgh Office 11/27/57)
- Dec. 13, Motion to extend time for filing Supersedeas bond filed.
- Dec. 13, Notice of Appeal filed.
- Dec. 16, Copy of Notice of Appeal sent to Clerk, U. S. Court of Appeals, Philadelphia, Pa. and Notice of Appeal sent to Hon. Joseph P. Willson, J.
- Dec. 17, Notice of Appeal sent to all Attorneys of record.
- Dec. 17, Supersedeas Bond filed. Sent to Pittsburgh Office for Order.
- Dec. 19, Supersedeas Bond in Amount of \$10,000.00 filed and sent to Pittsburgh for Order of Court.
- Dec. 23, Order entered granting extension of time for filing ~~supersedeas bond~~ signed by Willson, J. on 12/18/57 in Pittsburgh.
- Dec. 30, Supersedeas Bonds with approval thereon returned signed by Miller, J. in Pittsburgh 12/24/57.



II.

COMPLAINT

Jackson D. Magenau, Administrator of the Estate of Norman Ormsbee, Jr. deceased, plaintiff above named, files this his complaint against Aetna Freight Lines, Inc., defendant above named, and sets forth the following as his causes of action:

*Count I—Survival Action*

(1) Plaintiff is an individual, citizen and resident of the City of Erie, Erie County, Pennsylvania.

(2) Plaintiff is the duly qualified and acting administrator of the estate of Norman Ormsbee, Jr., a resident of Erie County, Pennsylvania, who died intestate March 20, 1956, and upon whose estate Letters of Administration were duly issued by the Register of Wills of Erie County, Pennsylvania, to plaintiff on May 28, 1956.

(3) The defendant, Aetna Freight Lines, Inc. is a corporation organized and existing under the laws of the State of Ohio, with its principal office for the transaction of its business in the City of Girard, Ohio, and is a citizen of the State of Ohio.

(4) This is a suit between citizens of different states wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

(5) On March 20, 1956 at approximately 11:30 p.m. plaintiff's decedent, Norman Ormsbee, Jr. was riding as a guest passenger an invitee, having been invited to ride

*Complaint*

therein by the driver, in a tractor hauling a semi trailer in a westwardly direction on Route 68 in Beaver County, Pennsylvania, approximately five miles east of Rochester, Pennsylvania.

(6) At the time and place aforesaid the tractor hauling said semi trailer was driven by one Charles Schroyer, as the agent, servant and employee of the defendant and upon the defendant's business and in the course of his employment.

(7) At the time and place aforesaid the said tractor and semi trailer were owned by one Daniel Fidler, Paxinos, Pennsylvania, who had leased the same to Aetna Freight Lines, Inc., defendant herein, and the same were being operated by Aetna Freight Lines, Inc. in the course of its business as a common carrier of freight in interstate commerce, pursuant to certificates of public convenience duly issued to it by the Interstate Commerce Commission.

(8) At the time in question the said tractor was hauling the trailer loaded with a load of steel for a shipper from Buffalo, New York to a point in Pennsylvania or Ohio, the exact point of destination being unknown to plaintiff, and being in the peculiar knowledge and possession of the defendant.

(9) At the time and place aforesaid the said Charles Schroyer, agent, servant and employee of the defendant as hereinbefore set forth, so negligently operated the said tractor and semi trailer that the same left the highway, ran down a steep embankment and overturned, crushing plaintiff's decedent and causing his instant death.

(10) As the result of defendant's negligence and the resulting death of plaintiff's decedent, the earning power

*Complaint*

of plaintiff's decedent for the balance of his natural life was cut off.

WHEREFORE, plaintiff claims of the defendant under this Count as a survival action damages in excess of \$3,000.00, exclusive of interest and costs.

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*Count II—Wrongful Death Action*

(11) For the purpose of Count II, plaintiff incorporates by reference the allegations of paragraphs 1 to 10 of Count I.

(12) Plaintiff's decedent was survived by the following who constitute his heirs and next of kin, and the only ones entitled to share in the benefits of the action for his wrongful death, and for whose benefit this cause of action is brought, viz,

Joan Ormsbee, Widow, R. D. No. 2, Waterford, Pa.

William Ormsbee, Son, Age 2½, R. D. No. 2, Waterford, Pa.

Norma Ormsbee, Daughter, Age 1½, R. D. No. 2, Waterford, Pa.

Carol Ormsbee, Daughter, Age ½, R. D. No. 2, Waterford, Pa.

(13) As the result of defendant's negligence as hereinbefore set forth and the resulting death of plaintiff's decedent, his wife and children have been deprived of support from plaintiff's decedent, their husband and father.

(14) Plaintiff is also entitled to recover in connection with the death of the decedent his funeral expenses, hos-

*Complaint*

pital and medical bills and administration expenses of his estate.

WHEREFORE, plaintiff claims of the defendant under this Count for the wrongful death of the decedent damages in excess of \$3,000.00, exclusive of interest and costs.

Jury trial demanded.

M. FLETCHER GORNALL

WILLIAM W. KNOX

*Attorneys for Plaintiff*

*Answer*

## III.

## ANSWER

And now, to-wit, this 16th day of July, 1956, the defendant, Aetna Freight Lines, Inc., answers the Complaint of plaintiff as follows:

*Count I—Survival Action  
First Defense*

Plaintiff fails to state a claim upon which relief can be granted against defendant.

*Second Defense*

Paragraphs 1, 2, 3, 4, 7, 8, of plaintiff's Count I are admitted; paragraphs 9 and 10 of plaintiff's Count I are denied; paragraphs 5 and 6 of plaintiff's Count I are denied for the reason that defendant lacks sufficient knowledge of their truth or falsity at this time.

*Third Defense*

Plaintiff's decedent was contributorily negligent at the time of the accident complained of which negligence was the proximate cause of his injuries or contributed to his injuries.

*Fourth Defense*

Plaintiff's decedent had assumed a risk which was the proximate cause of his injuries.



*Answer**Count II—Wrongful Death Action**First Defense*

Plaintiff fails to state a claim upon which relief can be granted against defendant.

*Second Defense*

Plaintiff incorporates by reference Paragraphs 1 to 10 of Count I of his Complaint in Paragraph 11 and defendant therefore admits or denies these allegations as set out in his Answer to Count I above; defendant denies Paragraphs 13 and 14, defendant denies Paragraph 12 for the reason that the truth or falsity of these allegations are within the knowledge of plaintiff alone.

*Third Defense*

Plaintiff's decedent was contributorily negligent at the time of the accident complained of, which negligence was the proximate cause of his injuries or contributed to his injuries.

*Fourth Defense*

Plaintiff's decedent had assumed a risk which was the proximate cause of his injuries.

WHEREFORE, defendant demands judgment against plaintiff under Counts I and II above.

BLOSS, WEBER AND PFADT

By GERALD J. WEBER

*Attorney for Defendant*

802 Palace Hardware Bldg.

Erie, Pa.

(s) FRED COOPE

*Attorney for Defendant*

704 Central Tower Building

Youngstown, Ohio

IV.

THE EVIDENCE.

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Transcript of proceedings May 27, 1957 at trial of the above-entitled action commencing May 27, 1957 at Erie, Pennsylvania, before the Honorable Joseph P. Willson, and a jury.

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Appearances:

On behalf of Plaintiff: Messrs. Firman, Gleen, Knox & Pearson: William W. Knox, Esq. of counsel; and Fletcher M. Gornall, Esq.

On behalf of the Defendant: Messrs. Blass, Weber & Pfadt: Gerald J. Weber, Esq. and Joseph F. McKrell, Esq. of counsel; and Fred Coope, Esq.

(5) WILLIAM BALCHUNAS, called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. May we have your name, address and occupation, please.

A. My name is William Balchunas. I am a state police officer of the Commonwealth of Pennsylvania.

Q. How long have you been engaged as a state police officer with the Commonwealth of Pennsylvania, please?

A. Approximately 12 years.

*William Balchunas—Direct*

Q. And on and before March 20, 1956, where were you stationed as a state policeman?

A. I was stationed at Rochester, Pennsylvania, at the Rochester substation.

Q. And referring you specifically to approximately eleven o'clock that evening, were you on duty the night of March 20, 1956?

A. I was.

Q. Again referring to this time and place, did you receive a phone call or any information at that time to investigate an accident?

A. I did.

Q. And would you give us the nature of the summons (6) that you received?

A. Well, a call was received at the state police barracks at Rochester relative to an accident which occurred approximately four and a half miles east of Rochester, Pennsylvania, on Route 68.

Q. And did you proceed to the scene of the accident?

A. I did.

Q. Before we go any farther, Officer, I would inquire if you could describe the stretch of road that surrounded the scene of the accident within a hundred or two hundred yards before and after the scene of the accident?

A. Well, this is a winding road, especially where the accident occurred. It is more or less of an "S" curve; traveling from east to west it is an "S" curve and downgrade. It is approximately 22 feet, concrete.

Q. And could you describe the nature of the grade, whether or not it was steep or shallow?

A. If traveling towards Rochester, Pennsylvania, it would be downgrade. That would be in a western direction.

*William Balchunas—Direct*

Q. Traveling westwardly it would be a downgrade. Could you describe the degree of the grade?

A. Well, I can't describe the degree. I don't know what the degree would be, although I know it was downgrade.

(7) Q. Then you proceeded to the scene of the accident?

A. I did.

Q. What did you find when you arrived at the scene of the accident?

A. I found a tractor-semitrailer over an embankment resting against a tree.

Q. Off of the road?

A. Off the highway.

Q. Do you recall the type tractor-trailer that you found, Officer, please?

A. Yes, it was a '50 Mack tractor which was towing a Gramm semitrailer.

Q. Officer, did you or did you not observe the freight if any that was on the trailer?

A. I did.

Q. Do you recall the type freight that the trailer was carrying?

A. I called them iron ingots. They were different sizes but they were very heavy.

Q. Do you know the weight of the steel that was on the equipment?

A. I don't.

Q. Could you tell the court and jury the nature of the trailer; was it a flat bed body or the nature of the trailer you found.

(8) A. I know it was a semitrailer, but the type, at the present time I can't recall that.

Q. State if you know whether or not there were walls and a roof on the trailer?

A. I believe there were walls and a roof on that trailer, but I am not too positive of it.

Q. You are not sure of that?

A. At the present time.

Q. Would you describe the condition of the road at the time that you arrived at the scene of the accident?

A. Why, at that time there was only one-way traffic, inasmuch as a telephone pole which had been ripped out and the lines was down, was blocking one of the lanes of travel.

Q. What was the condition of the pavement at this time?

A. It was dry.

Q. What was the condition of the air and the visibility at this time?

A. I'd say it was clear.

Q. And state whether or not you know whether or not there was any sleet or ice on the road?

A. There was no sleet or ice at that time.

Q. State whether or not you know whether or not there was any rain that had fallen at this time?

(9) A. There was no rain either.

Q. Would you describe to the court and the jury what you found in so far as the accident relates to the condition of the berm, the condition of the guard rails or any that you speak of?

A. I found that there had been eight guard rails ripped out, also a telephone pole, then finally, following the course of the semitrailer, it was finally resting against a tree.



*William Balchunas—Direct*

Q. State whether or not you formed an opinion and how you did so, if so, as to the direction that the truck-trailer was traveling at the time immediately prior to the accident?

A. By the tire marks going over hitting the guard rails, the pole, and finally going over the embankment and resting against the tree.

Q. Which direction can you tell that the truck was traveling?

A. That would be west.

Q. The truck was traveling westwardly?

A. Yes.

Q. State whether or not you observed any skid marks that might have been placed on the highway by this truck-trailer?

A. There was no skid mark on the highway.

(10) Q. Did you examine the highway closely for this?

A. I did.

Q. You found no skid mark?

A. There were no skid marks.

Q. You say that the tractor-trailer outfit left the highway and proceeded over an embankment, is that correct?

A. I did.

Q. From the point where the guard rails were ripped out, could you state in feet the number of feet from this point where the guard rails were ripped out, to the point where the tractor-trailer outfit lay at rest?

A. The final resting place in the matter of feet would be a hundred two feet.

Q. A hundred and two feet; and could you give us that a little bit more explicitly please, Officer?

A. From the telephone pole it measured 42 feet going at an angle to the final resting place against the tree, which was over an embankment there.

Q. Now, would that be the front of the tractor-trailer outfit you measured to, or the rear?

A. That would be the rear.

Q. And state whether or not you know the approximate length of the tractor-trailer outfit?

A. Well, in the State of Pennsylvania it can't be (11) over 50 feet.

Q. Do you know, did you measure the length of the tractor-trailer outfit at that time?

A. No, I didn't. It did look legal to me, it didn't seem exceptionally large, it was a normal tractor-trailer, semitrailer.

Q. It was a normal tractor-trailer, semi-trailer. I show you Plaintiff's Exhibit 5, and ask you if you could describe to the jury whether or not that represents the condition of the highway and the telephone pole and the guard rails and the scene of the accident the night that you arrived there at the scene?

A. Yes, it does. This is the scene of the accident.

Q. Now I point to—

THE COURT: Perhaps you better step down in front of the jury. Those are all in evidence?

MR. WEBER: Yes, they are.

Q. I show you this small white blur to the middle left of the picture, ask you if you can identify that?

A. Offhand I cannot, in this picture.

Q. I show you then Plaintiff's Exhibit 3 and ask you if you can identify this automobile in the center left of the picture?

A. Yes, I can. That is the troop car that we came to the scene of the accident.

(12) Q. Now Officer, I show you Plaintiff's Exhibit 5 and ask you if you can identify the blur, the white blur?

A. That appears to be the troop car.

Q. In your opinion is that the same troop car that is shown in this picture? (Indicating)

A. Yes.

Q. Is that the troop car that you appeared at the scene of the accident in?

A. It is.

Q. Now Officer, I wonder if you could describe to the jury from what you have told us, the direction that the tractor was traveling, and approximately where it left the highway as it is indicated by this picture?

A. Well, it would have to have left the highway before striking these guard rails, as it struck eight guard rails, it finally struck a telephone pole, from the telephone pole it swerved at an angle to the right and went over an embankment, traveling approximately 42 feet then resting against this tree I mentioned. There is approximately 60 feet of tire marks showing that the truck did leave the highway prior to hitting the telephone pole. From the telephone pole it is another 42 feet at an angle going over the embankment.

Q. Although we cannot see the tractor-trailer outfit on this picture, where would the tractor outfit be?

(13) A. It would be over the embankment down here. (Indicating)

Q. Down below the embankment there. Officer, I show you Plaintiff's Exhibit 4, and ask you if you can identify that?

*William Balchunas—Direct*

A. Yes. These are the guard rails and the telephone pole which was smashed in the accident, also the tire marks which showed that it dug into the berm here prior to going over the embankment.

Q. Officer, before I forget, I show you Plaintiff's Exhibit 5 and specifically refer you to these white marks shown on the right-hand side of the pavement, and ask you if those were skid marks that could be traceable to this truck?

A. No, these were not the skid marks which were involved in this accident. There was no skid marks on the highway.

Q. Now Officer, I show you Plaintiff's Exhibit 1, ask you if you can identify this?

A. I can. This is a picture of the deceased.

MR. WEBER: If your Honor please, we renew our objection. That was marked, we renew our objection to it, at this time.

THE COURT: Let me see—have I admitted it in evidence, is that admitted?

(14) MR. GORNALL: Yes, your Honor, Exhibit Number 1.

THE COURT: All right.

A. (Continuing) This is a picture of the deceased, also showing the truck, tractor part of the tractor and on the rear there is the semitrailer, and this is the tree that I was talking about where it is resting against this tree.

Q. Would you show it to the jury.

A. (Showing exhibit to jury.)

Q. Now Officer, I ask you to state whether or not you observed whether or not there were any markings on the tractor-trailer outfit?

*William Balchunas—Direct*

A. Offhand I can't remember if there was or not.

Q. State whether or not you observed whether or not there were any decals or trucking company names on the doors of the cab?

A. I can't remember of seeing any right at the present time, although there may have been.

Q. Officer, state what side of the road as this tractor-trailer proceeded westwardly, state what side of the road it went off the road and over the embankment?

A. That would be on the north side.

Q. Would it be to the right or the left of the driver's side?

A. That would be to the right of the driver's side.

(15) Q. State whether or not you found any documents, bills of lading, log books or any documents of any type around the ground or in the cab at this time?

A. I did find some papers and documents which belonged to the truck.

Q. And what did you find, if you remember, Officer, please?

A. There were invoices there and I believe on some of these invoices the name of Carl Schroyer was found on the bottom, and from that I determined that he possibly was the driver of the truck at the time, which I am carrying still on my report as he being the driver, although at the scene there it was rather difficult to determine who was the driver.

Q. Officer, state whether or not you identified the bodies of the two men that you found?

A. I didn't identify either body.

Q. You stated that this tractor-trailer outfit went off the road near an "S" curve. Could you describe what you mean by an "S" curve, Officer, please?



*William Balchunas—Cross*

A. It is a winding curve that, that is, forms an "S" pattern and approximately in the center of the "S", that is where the truck tractor left the highway and struck the guards, pole, and went over the embankment.

MR. GORNALL: I think that is all I have, Mr. (16) Weber.

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*Cross-Examination.*

BY MR. WEBER:

Q. Officer Balchunas, did you find any documents on the body of either person to identify the parties?

A. I didn't search the bodies. The documents or invoices that I stated I found were scattered about the scene of the accident.

Q. Was there another police officer there with you?

A. There was another officer assisting me in this investigation. His name is Trooper Mahoney.

Q. Is he here today?

A. He is present.

Q. Do you know if he searched the bodies for any means of identification?

A. Trooper Mahoney did take the wallets out of the pockets of the deceased.

Q. Now the documents, bills of lading, or the like that you found on the scene, to whom did you turn those over?

A. I turned some of these documents over to Mr. Roberts I believe of the Aetna Freight Lines, but I am not sure if that's his name, but he represented the Aetna Freight Lines and came at the barracks the following day and I assisted him in any way I could in this accident.

(17) Q. Do you recollect exactly what the documents were that you turned over to him?

A. No I don't.

Q. Was any inventory or list or receipt kept of that?

A. No, under them conditions we wouldn't keep a record.

Q. Did you visit the scene of the accident the next morning with Mr. Roberts?

A. Yes, I did.

Q. Did you examine the equipment in any way at the scene of the accident?

A. No, I didn't.

Q. Did you personally undertake to notify any of the parties such as the Aetna Freight Lines, or any relatives, of the deceased?

A. I tried to notify the Aetna Freight Lines that night. Whether I got through or not, I apparently must have, because he came around the following day, although as far as the deceased is concerned, the coroner, or the funeral parlors generally notify the relatives or parents of such.

Q. In connection with that, were you able to identify the owner or the party responsible for the operation of the truck from signs on the truck, or from papers of any sort?

(18) A. As I stated before, I thought Mr.—

MR. GORNALL: I object to that, your Honor.

THE COURT: What is the reason for that objection? You brought it out.

MR. GORNALL: The person responsible would be a conclusion, your Honor.

MR. WEBER: I didn't ask him that.

THE COURT: What was the question?

(Question read.)

MR. GORNALL: I'm sorry.

THE WITNESS: Are you referring to the owner of the—

THE COURT: Vehicle, equipment.

THE WITNESS: Well, part of the equipment was owned by an individual, your Honor. The truck-tractor was owned by Donald Fidler of R. D. 1, Paxinos, Pennsylvania, and the semitrailer I believe was owned by the same person.

Q. Well, from what physical signs did you come to that conclusion at the scene of the accident?

A. Why, the following morning I know that a Mr. Fidler, or in the afternoon, appeared at the station and he told me that he was the owner. Whether I did find an ownership card at the time, I don't know.

Q. Do you recollect whether or not there were any signs on the truck of any sort that you saw, to identify (19) Aetna Freight Lines?

A. No, I don't recollect that. Like I said, on some of these papers that were on the ground, I did see the name of Aetna Freight Lines. I determined the cargo from some of the invoices and papers.

Q. From papers on the ground, is that it?

A. Yes. There could have been "Aetna Freight Lines" on this truck, it could have been leased out to them.

Q. You don't recollect whether or not you saw that sign or not. Now arriving at the scene, did you observe the bodies of the driver and the deceased plaintiff here?

A. I did.

*William Balchunas—Cross*

Q. Could you tell from your observation whether or not any person had touched or tampered with the bodies or taken anything from them?

A. From my observation I couldn't say if anyone did tamper with the bodies, although I doubt it very much.

Q. Do you have any means of knowing how soon after the accident, or how soon after the call, you arrived at the scene?

A. Yes, I do. I received this call at, time notified of the accident would be 11:20 p.m., date of March 20, 1956, and I arrived at the scene at 11:40, which would give me approximately twenty minutes from the (20) time I received that call to starting an investigation at the scene.

Q. And am I correct this Officer Mahoney in your presence actually removed the wallets from the bodies of these two?

A. Officer Mahoney, he removed the wallets and brought them up to the troop car, but he did not remove them in my presence, because at that time it was necessary to have traffic control; as I stated before the lines were down, the pole was under one line there, traffic was coming from both directions.

Q. Did you examine the contents of these wallets in the presence of Officer Mahoney?

A. Yes, I did.

Q. With reference to Norman Ormsbee, Jr., do you recollect the contents of his wallet?

THE COURT: Now gentlemen, let's see what is the purpose of this. There is no question about who they are, and they have been identified. At pretrial no issue was raised, I don't see the purpose of it.

*Colloquy*

(At side bar.)

MR. WEBER: In the first instance, the only issue of identity of Ormsbee was a Florida driver's license. We wish to show that license but no other Pennsylvania identity card or driver's license was found. In the second (21) place—

THE COURT: What would be the purpose of that?

MR. WEBER: The purpose of that he was without license to drive in Pennsylvania.

THE COURT: What would that still have to—

MR. WEBER: That goes to the damages element, of mitigation of damages.

THE COURT: Because he didn't have a Pennsylvania driver's license?

MR. WEBER: Yes, sir. If your Honor please, that is certainly—

THE COURT: This is cross-examination, you have got a man on cross-examination who investigated the scene of the accident. If you want to bring that up, as a defense matter—

MR. WEBER: This is the man that knows.

THE COURT: But you won't get anywhere with that.

MR. WEBER: In the third instance, there was no money in this man's wallet, and the plaintiff's own witness will establish that when he left the place where they were last seen, \$5 was given to the decedent as he went out.



*Colloquy*

THE COURT: So what does that prove in a civil case for negligence?

MR. WEBER: We have several hours between the time (22) he was last seen there.

THE COURT: You can't speculate about what he did with the money, you could speculate he stopped somewhere and bought some liquor.

MR. WEBER: The man has—

THE COURT: I am going to admit it. Objection overruled.

MR. WEBER: I want to know how he identified him.

THE COURT: There is no issue on that in this case, no issue on that. One body was Ormsbee's, one Schroyer's.

MR. WEBER: As to he had no Pennsylvania license—

THE COURT: What is the purpose of that?

MR. WEBER: That goes to mitigation of damages.

THE COURT: No, it doesn't.

MR. WEBER: Not having a driver's license, it seriously impairs a man's earning power.

THE COURT: You don't prove it because he doesn't happen to have it in his pocket.

MR. KNOX: He might have got one the next day.

THE COURT: This man on direct examination was asked about this proposition, but now you want to

*William Balchunas—Redirect*

go into a person's wallet for more details. I don't think it is proper on cross-examination.

Proceed, gentlemen.

(23) MR. WEBER: Note an exception.

THE COURT: You don't even need to note an exception.

(In open court.)

THE COURT: Proceed. Any further questions?

MR. WEBER: One moment.

That is all, your Honor.

MR. GORNALL: I have just two more questions, Officer.

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*Redirect Examination*

BY MR. GORNALL:

Q. First of all, did you or did you not observe any debris on the highway that might have come from this tractor-trailer outfit?

A. On the highway, no.

Q. State whether or not you know where the tractor-trailer outfit was taken if it was taken some place after the accident?

A. It was taken to Rosenberg's junk yard in Beaver Falls. I was directing traffic all that afternoon, I know it was pulled by his wrecker because it was necessary for me to regulate traffic at that time.

Q. What afternoon was that, Officer?

A. The following day.

MR. GORNALL: That is all.

(Witness excused.)

*D. W. Mahoney—Direct.*

(24) DONALD W. MAHONEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Would you state your full name, address, and business or occupation, please?

A. Donald W. Mahoney, 432 Harmony Avenue, Rochester, Pennsylvania. I am employed by the Commonwealth of Pennsylvania as a state policeman.

Q. And how long have you been in the employ of the Commonwealth of Pennsylvania as a state trooper, please?

A. Six and a half years.

Q. State whether or not on and before March 20, 1956, you were on duty at the Rochester, Pennsylvania, police barracks?

A. Yes, sir, I was.

Q. State whether or not you in the company of Officer Balchunas, received a call to investigate a collision, or an accident, out on Route 68?

A. Well, the call was received at the Rochester substation, and I proceeded with Trooper Balchunas to the scene of the accident to make the investigation.

Q. And what time did you receive the call, and what time did you arrive at the scene of the accident?

(25) A. Well, as Officer Balchunas has stated, he has a report there that the call came in at approximately 11:20 p.m., and we arrived at the scene approximately 20 minutes later, or 11:40 p.m. that evening.

Q. And at the time that you arrived at the scene of the accident, state whether or not you observed the condition of the pavement at this time?

*D. W. Mahoney—Direct*

A. Do you mean atmospheric conditions?

Q. Yes.

A. The road was dry.

Q. State whether or not you observed and recall the visibility at that time and place?

A. You mean right at the scene of the accident?

Q. At the time that you arrived there, yes.

A. Well, it was clear.

Q. State whether or not you recall whether or not there was any ice or snow or sleet specifically on the highway?

A. No, sir, there was not.

Q. State whether or not you observed whether or not there were any skid marks on the highway at this time and place that might have come from the tractor-trailer outfit?

A. No, sir, we didn't find any skid marks at all; that is, skid marks that would be made by the semi outfit tractor-trailer.

(26) Q. State whether or not you found any log books on the tractor-trailer outfit, or near the scene of the accident at this time and place?

A. Well, at the final resting spot where the tractor-trailer outfit came to rest, while down looking around the scene and around the bodies, when I took the wallets from the bodies, I noticed a lot of debris, papers and such as Officer Balchunas has stated, and also little booklets. Now I presume they were log books; they were rectangular shape with yellow paper, and it had the time that the—I didn't go through it, I just looked at it, you could see, I presumed they were log books.

Q. Are you familiar with truck drivers' log books?

A. Well, I know what the purpose is, what they are used for.

*D. W. Mahoney—Direct*

Q. Have you ever seen a truck driver's log book before?

A. No.

Q. Anyway, you found some books or papers there?

A. Yes, sir.

Q. State whether or not you recall what you did with those books and papers?

A. No, sir, I don't actually recall what I did with them there. I do know that if anything like that is found around the scene of the accident we usually pick it up and (27) stick it back in the cab or in the vehicle or in the glove compartment.

Q. Officer, I wanted to ask you one more question. Could you describe the condition of the highway in so far as it relates to the grade and the curves at the scene of the accident, please?

A. Well, it is downgrade, or traveling west it would be downgrade, concrete, and at the precise, that is the point of the accident it would be in the center of an "S" curve and I would say it's, well just depends on the individual person whether he would call it steep or not, but I would say it is a rather steep hill.

Q. You would?

A. I would call it a hill, not a grade. I wouldn't call it a slight grade.

Q. Would it be correct in your opinion to call it a rather steep hill?

A. Not a rather steep hill; I'd say it was a hill, a hill, not a real steep hill.

MR. WEBER: If your Honor please, this line of questioning is objected to unless some positive standard can be established and the—



*D. W. Mahoney—Direct*

THE COURT: Well now, I think the witness may testify to the best of his ability, describe the scene.

MR. WEBER: I believe the witness is being led, (28) object to the leading nature of the question.

THE COURT: Counsel will not lead him. The officer very obviously is disinclined to agree with counsel, that he has his own idea how to describe it, so he is not being led. He is putting leading questions.

MR. WEBER: Without leading answers.

THE COURT: Proceed, gentlemen.

Q. Officer, state whether or not you know whether or not this curve was to the left or to the right as he proceeded westwardly?

A. Westwardly the curve would come to your right first, and then to the left hand.

Q. And was it to the right or the left that the tractor-trailer outfit evidently went off the—strike that.

Was it, the curve, to the right or the left, that had the guard rails taken out, and that the tractor-trailer outfit lay below?

A. Well, the tractor-trailer outfit went off to the right-hand side of the highway.

Q. That is correct. Could you proceed and tell which curve it was now, please?

A. Well, it was the, as he was, as he would be coming around the right-hand curve, but it would happen in the center of the "S" curve.

(29) Q. In the center of the "S" curve. Officer, I show you Plaintiff's Exhibit 5, and ask you after looking at that if you can tell whether or not it would be the curve to the left or the curve to the right as a person proceeded westwardly?

514

*D. W. Mahoney—Cross*

A. Here I would say that he came around here (indicating) and right there would be your, more or less the center of your "S" curve.

Q. I see.

A. There would be your starting of your "S" curve.

Q. Is this curve to the left or right as you proceeded westwardly?

A. That would be to the left here.

Q. To the left?

A. Yes, sir.

Q. How long is the road from Zelienople to Rochester, Pennsylvania; what distance does that cover?

A. Rochester to Zelienople I believe is 19 mile.

Q. And generally what is the condition of that road?

A. That is a good road; it's according to the condition of the road; it is not bad, we don't have very many accidents on the road.

MR. GORNALL: I think that is all I have, Officer.

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(30) *Cross-Examination*

BY MR. WEBER:

Q. How long have you been with the Pennsylvania state police?

A. Six and a half years, sir.

Q. How long have you been stationed at the Rochester barracks?

A. Three and a half.

Q. When you say this is a good road, is this a paved concrete highway?

A. At the point of the accident it's a concrete highway, yes, sir.

*D. W. Mahoney—Cross*

Q. And your testimony was that it is 19 miles from Zelienople to what point—Rochester?

A. I said that is approximately 19 miles from Zelienople to Rochester.

Q. And with what highway does it connect at Zelienople?

A. Route 19.

Q. Did you conduct an investigation of the equipment at the scene?

A. No, sir, I did not.

Q. Did you examine it in any way?

A. No, sir, I did not.

Q. I call your attention particularly to the tires (31) of the vehicle that was involved in the wreck, and ask you if you made an examination of them at the scene?

A. No, sir, I did not make an investigation of the tires. However, I believe that the tires had good tread on them.

Q. Well, you did look at them, or examine them, is that it?

A. I didn't examine them, no, sir. The position of the semitrailer, you would more or less have to glance at them anyhow.

Q. That is, you, just from looking over the wreck as a whole you would see the tires most obviously, is that correct?

A. Yes, sir.

Q. May I show you photographs that have been identified as Defendant's Exhibits A and B, and ask you if they represent the scene of the wrecked tractor-trailer as you saw it?

A. It looks familiar, yes, sir.

*H. L. Brown—Direct*

Q. To your knowledge that is a true and correct representation of the scene of the accident and the vehicle involved?

A. Yes, sir.

MR. WEBER: That will be all.

(Witness excused.)

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(38) HERBERT L. BROWN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Will you state your full name and address, please.

A. Herbert L. Brown.

Q. Could you speak up.

A. Herbert L. Brown. I live in Whitehouse, Florida.

I lived at, in Waterford.

Q. Where do you live now?

A. Whitehouse, Florida.

Q. Whitehouse, Florida?

A. Yes.

Q. Did you know the deceased, Norman Ormsbee, Junior?

A. Yes, I did.

Q. State whether or not you are related to the deceased Norman Ormsbee, Jr.?

A. Cousin, second cousin.

Q. Second cousin. Referring specifically to the afternoon of March 20, 1956, were you in the company of Mr. Norman Ormsbee?

A. Yes, I was.

*H. L. Brown—Direct*

(39) Q. What were you doing at this time?

A. At which time?

Q. Could you speak louder?

A. At which time?

Q. The afternoon of March 20?

A. We was in Erie.

Q. What were you doing in Erie?

A. I really don't remember now. I really don't remember. I don't remember whether he was looking for a job at that time or not.

Q. And referring specifically to approximately four or five in the afternoon, did you have occasion to go to Jones' Tavern about a mile south of Waterford, on Route 19?

A. Yes, we went to Jones' Tavern somewhere around five o'clock, somewhere between five and six.

Q. And were you in the company of Mr. Ormsbee at this time?

A. Yes.

Q. And when you entered Jones' Tavern, state whether or not you know who was in the tavern at that time?

A. Well, I didn't know his name at that time, or I didn't know him. I heard later it was Mr. Schroyer.

Q. Was he a truck driver, do you know?

A. Yes.

(40) Q. Who else was in the Jones place at that time?

A. Mr. Jones, and I don't remember whether there was anyone else in there or not. I don't remember.

Q. Who is Mr. Jones?

A. Mr. Jones is the one that runs the tavern.

Q. He runs the tavern. Would you speak louder so



*H. L. Brown—Direct*

all these members of the jury hear you, please. How long were you in this Jones place on this particular afternoon?

A. Oh; it could have been maybe 15 minutes or maybe a half hour. I don't remember.

Q. Did you have an opportunity to meet and engage in conversation with one Charles Lester Schroyer while you were in the company of Norman Ormsbee?

A. Yes, I talked to him about 15 minutes or so, I don't remember.

Q. After engaging in conversation with Mr. Schroyer, and Mr. Ormsbee, state whether or not Mr. Schroyer offered you \$25 to make a trip with him to Rochester, Pennsylvania?

A. Yes, he did.

Q. He did; and what was your answer?

A. I told him I didn't want to go.

Q. State whether or not Mr. Schroyer then offered the \$25 to Norman Ormsbee?

A. Yes, yes he did.

(41) Q. And what was the reply of Norman Ormsbee?

A. Well he said he would go.

Q. After this conversation did Norman Ormsbee and Mr. Schroyer leave Jones' place, to your knowledge?

A. Yes.

Q. Did you ever see Norman Ormsbee after this?

A. No.

Q. Alive?

A. No.

Q. State whether or not, if you know the reason that Mr. Schroyer offered \$25 first to you and then to Mr. Ormsbee, to make this trip?

*Colloquy*

**MR. WEBER:** If your Honor please, we object to this line, this question, and we ask for an offer of proof.

(At side bar.)

**MR. GORNALL:** Your Honor, we frame this question in this manner to show the intent, purpose and motive of Mr. Schroyer in offering employment to this man. We realize that it is hearsay, but it comes in under the—first of all, under the testimony of the man acting in the course of his employment, secondly under the *res gestae*, and thirdly, to show the intent, purpose and motive. I don't believe—

**THE COURT:** Intent and purpose and motive of what?

(42) **MR. GORNALL:** To show the reason why this man hired Norman Ormsbee to go with him.

**THE COURT:** Who do you say he will say? He asked for your offer of proof.

**MR. GORNALL:** He is going to say the man was having trouble with the outfit, he wanted help.

**THE COURT:** What was the trouble, specifically?

**MR. GORNALL:** This witness I do not believe will say specifically what the trouble was; he will say that he had trouble with the mechanical phase of the equipment.

**MR. KNOX:** We have a subsequent witness who will state—

**THE COURT:** Another witness will say the same thing in more detail?

MR. GORNALL: That is correct.

THE COURT: You shouldn't have been in such a hurry in making the objection.

MR. WEBER: We know what it is, it is all a matter of record before. This testimony in the first instance is hearsay, it is not part of any *res gestae*. First, the statement of Schroyer cannot bind Aetna unless this was within the scope of his employment.

THE COURT: That is what they allege it is.

MR. WEBER: We think they have to establish that.

(43) THE COURT: Well, here is a man on a trip; the point is, here is a man on a trip. According to the issue that has been raised here now it is coming out, they are going to show he is having some trouble with his equipment. I don't see anything objectionable to it. What is the objection?

MR. WEBER: The only testimony this man can give is hearsay testimony.

THE COURT: I understand that; it is just like the testimony of an engineer or brakeman telling about the equipment on a train during the operation of the train.

MR. KNOX: Why does the man leave home? You are entitled to put that in.

THE COURT: You see, there is no liability established yet, not after the accident. This is before anything happened, and in the course of his employment he comes in, he says "We are having some trouble." The rule might be—we will put it this way,

*H. L. Brown—Direct*

the rule is we admit, generally admit it. The rule favors admissibility. Do you have any authority to the contrary?

**MR. WEBER:** We say in the first instance it is pure hearsay, does not come within any recognizable exception of the hearsay rule.

**MR. GORNALL:** We say it could come in under any of three exceptions, your Honor.

**(44) THE COURT:** Objection overruled. Go ahead.

(In open court.)

(Last question read.)

**Q.** Would you answer that question, please.

**A.** He had been having some kind of trouble.

**Q.** Just a minute.

**THE COURT:** Speak up and tell what he said about it.

**THE WITNESS:** That he had been having some kind of trouble with his truck and he wanted someone to be with him. He figured, he was expecting more trouble with it.

**Q.** The reason he wanted someone with him then was—

**A.** He had been having trouble with the truck.

**THE COURT:** How did he put it, what language did he use?

**THE WITNESS:** I really don't remember what words he used at that time.

**THE COURT:** All right.

*H. L. Brown—Cross*

Q. Did he state it in more than—

MR. WEBER: If your Honor please, I believe at this time I'd be entitled to cross-examine the witness as to the extent of his recollection of this conversation to see—

THE COURT: You can afterwards, certainly. Go ahead.

(45) Q. Did he state this reason just one time?

A. Well, he had been talking about it, he had been talking about it before I got in, before I got to the place.

MR. WEBER: That is objected to.

Q. Did he state—

A. That is according to Mr. Jones.

Q. Did he state this reason more than one time in your presence?

A. I really can't say.

MR. GORNALL: That is all.

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*Cross-Examination*

BY MR. WEBER:

Q. Did he state this reason in your presence at all?

A. Yes. Well, if he did I forgot. I know he was having trouble, he told me he was having trouble with the truck, but I don't remember what his trouble was.

Q. Did you get this information from Mr. Jones or Mr. Schroyer?

A. Directly from Mr. Schroyer.

Q. And did he tell you the nature of the trouble?

A. Well if he did I don't remember now.



*H. L. Brown—Cross*

Q. Did he ask anybody to drive?

A. Well, he wanted someone more to be with him, is (46) the way I understood it.

Q. Did you understand that from something he said?

A. Yes.

Q. What did he say?

A. I can't tell you exactly, but he offered me \$25 if I'd go with him on the trip.

Q. Was there any conversation about how much money he would draw at the end of his trip?

A. There could have been, but if there was I don't remember just what it was.

Q. Did he have the \$25 to pay beforehand?

A. No, no he didn't.

Q. To the best of your recollection—

A. If he did he didn't say.

Q. To the best of your recollection was it necessary to go to the end of his trip to get this money?

A. Well, I believe so.

Q. And where was the trip to go to, do you recollect those terms?

A. Well he named a place at that time but I have forgot what it was now.

Q. You have no idea where that was?

A. It was down the line a ways, but I don't remember where it was.

Q. Did he state anything about how soon he'd be (47) back?

A. I don't remember about that part of it.

Q. How long were you—

A. I wasn't interested in going so I didn't say much about it.

Q. What was that?

*H. L. Brown—Cross*

A. I wasn't interested in going with him, so I didn't pay much attention to it.

Q. Did he make any arrangement, did he talk to—strike that, please.

Were you present during all of the time that he was in the tavern up until Mr. Ormsbee left?

A. No. Well, I was—what was that question again?

MR. WEBER: Read it, please.

(Question read.)

A. Yes. Not all the time he was there.

Q. No, but I believe you stated that he had been talking to Mr. Jones for some time before you arrived, is that correct?

A. Yes.

Q. And some of this question on the arrangements, or the supposed trouble was something he told Jones and Jones mentioned to you, is that correct?

A. He told me he had been having trouble.

(48) Q. Did Jones tell you later that the fellow had told him that?

A. Yes.

Q. Have you talked this over with Jones since?

A. We talked some about it.

Q. So you can't remember one word that the driver said at any time about this situation now?

THE COURT: He hasn't said that.

Q. Can you remember any specific statement that the driver said?

A. I can't remember anything, no, I can't, anything specific outside he wanted to give me \$25 to go with him.

Q. He wanted to give you it?

A. Yes.

Q. You don't remember what you were to do for that?

A. He just wanted someone to help him, he was afraid he was going to run into trouble.

Q. Did he say that?

A. Well, I don't remember whether he said it in that words or not.

Q. Did you or Mr. Ormsbee have anything to eat while you were in the tavern?

A. Not that I remember.

Q. Anything to drink?

(49) A. Yes, we did, but I don't remember what it was.

Q. Now how long before that time had you been with Mr. Ormsbee that day?

A. Oh, I'd been with him probably most of the day, several hours anyway.

Q. Did it start before noon?

A. Yes.

Q. Where did you have lunch around noon?

A. I don't remember.

Q. Did you eat lunch together?

A. Well, we was together most of the time for several hours. I don't know, I don't remember now.

Q. And had Mr. Ormsbee, to your knowledge, eaten anything up to the time he left with Mr. Schroyer?

A. I don't remember now.

Q. Did anything else happen between you and Mr. Ormsbee before he left on the trip with Schroyer?

THE COURT: What do you mean?

Q. Was there any further conversation?

A. Well Mister, he didn't have any money with him, and I loaned him some money to go with him.

*H. L. Brown—Redirect*

Q. This was Ormsbee you mean?

A. Yes.

Q. How much?

A. Five dollars.

(50) Q. Did Mr. Schroyer try to borrow any money?

A. Not from me.

Q. Did he try to borrow from anyone?

A. Not that I know of.

Q. Not that you know of. Did Mr. Schroyer attempt to sell anything during the time you were there?

A. Not that I know of. I don't remember anything about that.

Q. About what time was it when they left?

A. Well, it was probably somewhere around maybe 5:30 to six, I think somewhere around there. I don't know exactly.

Q. And Jones' Tavern is on what highway?

A. It is on Route 19 south of Waterford.

Q. And Route 19 leads south from Waterford, and passes through Belienople, do you know that?

A. Yes.

MR. WEBER: That is all.

MR. GORNALL: Just one other question.

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*Redirect Examination*

BY MR. GORNALL:

Q. State whether or not you observed this tractor-trailer outfit proceeding down Route 19 south after Schroyer and Ormsbee left?

A. Well, after they left, no, the truck was gone.

*H. L. Brown—Recross*

(51) Q. State whether or not you saw the tractor-trailer outfit proceeding southwardly down Route 19?

A. I just don't remember at that time.

Q. Do you understand my question, Mr. Brown?

A. Well, they got in the truck and went south.

Q. That is what I want to know.

BY THE COURT:

Q. Did you see them get in the truck?

A. I don't remember seeing them get in the truck.

Q. Did you see the truck pull away?

A. Well, I don't—I believe I was talking to somebody, I don't think I looked. When Mr. Ormsbee went out with Schroyer, I don't remember looking after that.

THE COURT: I guess that is all.

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*Recross-Examination*

BY MR. WEBER:

Q. You said you were talking to someone and didn't look. Who else was in the tavern then at the time after Schroyer and Ormsbee left?

A. I really don't know.

Q. Was Jones still there?

A. Yes, Jones was there.

Q. Would you have been talking to Jones at that time?

A. I could have. I am not sure now.

(52) Q. Is it likely you were talking about some of the things that Jones learned from the driver, is that it?

A. Well, it could have been, I don't remember.

Q. Isn't it true a lot of your recollection of this came from things that Jones told you?

A. No.



*Instructions to Jury*  
*D. W. Mahoney—Direct*

MR. WEBER: That is all.

MR. GORNALL: That is all.

(Witness excused.)

MR. GORNALL: Do you want me to proceed?

THE COURT: Just a minute. We will recess.

Members of the jury, I think it is of course evident to you that you decide a case of this kind solely upon the testimony, the evidence presented in the courtroom alone, and that means of course you don't arrive at any conclusion in the case whatsoever until you have heard all the testimony, the summations of counsel, the charge of the court. The jury must wait and listen and observe until the case is over, then you decide the issues that are left with you.

I don't know how interesting this case is to people in and about the City of Erie, or people that you might chance to talk to while you are sitting on the case. That is why you are assigned a place all to yourselves in this court.

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(53) DONALD W. MAHONEY, was recalled on behalf of the defendant, and having been previously duly sworn, testified as follows:

*(54) Direct Examination*

BY MR. WEBER:

Q. Officer Mahoney, did you examine the bodies of the two parties that you found at the scene?

A. Well, I went down to the scene and I felt around the bodies for wallets.

*Charles Jones—Direct*

Q. Prior to the time that you felt, was there any indication visible to you, that any other party had tampered or had touched the bodies in any way?

A. No, sir, I don't believe anyone would want to.

Q. Can you tell us with respect to money, whether or not any funds were found on either of the deceased persons?

A. The wallets were removed from the bodies and taken up to the troop car where the contents of the wallets were checked and we found it was either three or four cents in the one wallet, I believe the wallet was Ormsbee's wallet.

Q. Did you find any money in the Schroyer wallet?

A. No, sir, none whatsoever.

MR. WEBER: That will be all.

(Witness excused.)

THE COURT: The two officers may be excused then, gentlemen?

MR. WEBER: Yes, sir.

(55) MR. GORNALL: Yes, sir.

THE COURT: All right.

MR. GORNALL: Mr. Jones.

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CHARLES JONES, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Your full name, address and business or occupation, Mr. Jones?

A. Charles Jones, Waterford.

*Charles Jones—Direct*

Q. What is your business or occupation?

A. Run Jones' Tavern.

Q. Jones' Tavern. Where is Jones' Tavern located?

A. One mile south of Waterford on 19.

Q. On Route 19?

A. Yes, sir.

Q. Mr. Jones, referring specifically to March 20, 1956, were you operating your place of business out there in Waterford?

A. Yes, sir.

Q. And referring to about four or five or 5:30 in the afternoon, do you recollect whether or not a Mr. Schroyer, a truck driver, entered your place of business?

A. I remember the truck driver coming in.

(56) Q. And what time was it that this truck driver entered your place of business?

A. Well, I'd say around between 3:30, a quarter to 4:00.

Q. And did he have anything to eat or drink at that time?

A. He had two sandwiches and a short bottle of beer.

Q. And did you engage in conversation with Mr. Schroyer at this time and place?

A. I did.

Q. Specifically, did you engage in any conversation with Mr. Schroyer regarding any trouble that he was having with his outfit?

A. He was telling me about it, yes.

Q. What did he tell you about it?

MR. WEBER: This is objected to as hearsay.

MR. GORNALL: Your Honor, we are putting into the same thing we were in before.

*Charles Jones—Direct*

THE COURT: I understand at the time of the last offer the other witness' testimony would be followed by this witness, the same line of testimony.

Objection overruled, proceed.

Q. Would you tell us what you talked about so far as the trouble that they were having is concerned?

A. Well, he was telling me he had trouble ever since (57) he left the place where he picked his load up.

Q. What was the nature of the trouble that he had?

A. Brakes on the tractor, also the trailer.

Q. State whether or not you heard Mr. Schroyer offer Mr. Brown \$25 to go with Mr. Schroyer on the trip?

A. I did.

Q. Did Mr. Brown refuse or accept the offer?

A. He refused.

Q. State whether or not you know whether or not Mr. Schroyer then offered Mr. Ormsbee \$25 to make this trip?

A. He did.

Q. Did Mr. Ormsbee accept or refuse?

A. Yes, sir.

MR. WEBER: I didn't get that answer.

THE COURT: He just said "Yes, sir".

Q. I'm sorry. Did he accept or refuse this offer?

A. He accepted.

Q. He accepted. State whether or not you saw Mr. Brown and Mr. Ormsbee leave your place of business together or—excuse me; Mr. Brown, Mr. Ormsbee I said—strike that—state whether or not you saw Mr. Schroyer, the truck driver, and Mr. Ormsbee leave your place of business?

A. I did.

*Charles Jones—Cross*

Q. State whether or not you saw Mr. Ormsbee and Mr. Schroyer get in the tractor-trailer outfit?

(58) A. Yes, sir.

Q. State whether or not you know and saw which one of the men got into the driver's seat?

A. The regular truck driver.

Q. State whether or not you saw the tractor-trailer outfit pull away from your place of business?

A. I did.

Q. Which way did it proceed?

A. South on 19.

MR. GORNALL: That is all.

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*Cross-Examination*

BY MR. WEBER:

Q. You heard an offer of Schroyer first to Brown to pay him \$25 to go along?

A. That's right.

Q. What was Brown to do for \$25?

A. Go along on the trip.

Q. What was he to do in the nature of any work?

A. Wasn't anything mentioned.

Q. There was nothing mentioned about work, is that correct?

A. Not in front of me.

Q. Not in front of you. Was there anything mentioned to Ormsbee on the kind of work he was to do?

A. No, sir.

(59) Q. In front of you?

A. No, sir.



*Charles Jones—Cross*

Q. Were you present during most of this conversation?

A. Not all of it, no.

Q. Now, you say Schroyer came in about 3:30 to 3:45?

A. I'd say that.

Q. Had two sandwiches and a short bottle of beer?

A. Yes, sir.

Q. What time did Brown and Ormsbee come to your place?

A. Well, I'd say around maybe a quarter after or 4:30.

Q. A quarter after or 4:30?

A. (Nodding head.)

Q. That is 4:15 or 4:30, is that right?

A. (Nodding head.)

Q. And what time did Ormsbee and Schroyer the truck driver, leave your place?

A. Well, that I couldn't say. I was busy at the other end when they started to walk out.

Q. Well, you were busy at the other end when they walked out?

A. That's right.

Q. Other end of what?

A. The bar.

(60) Q. You mean away from a window or something?

A. The bar don't run along the windows. The bar runs the other way, away from the window.

Q. You don't know what time, is that right?

A. Right.

Q. You weren't particularly observing?

A. Right.

*Charles Jones—Cross*

Q. Were there any other persons in there at the time?

A. No, sir.

Q. Well, did Mr. Brown go out with them in any way or did he stay in?

A. He stayed in with me.

Q. He stayed in with you; were you talking to him as Ormsbee and Schroyer left?

A. Yeah.

Q. I believe you testified that you saw the driver mount into the driver's seat and the like. Can you tell us now you happened to notice that when you noticed nothing else about their leaving?

A. That is a different question.

THE COURT: Well of course, Mr. Weber, he hasn't said he noticed nothing else. You asked him about the time, he said he didn't notice the time. That incorporates something in the question he didn't say.

(61) Q. How did you happen to notice Ormsbee and Schroyer getting in the car, in the truck?

A. I walked out there and watched them get in after they left the place.

Q. After they left your place?

A. Yes, sir, that's right.

Q. Did Mr. Brown stay in, inside?

A. Yes, sir.

Q. And could you approximate to any degree the time when Ormsbee and Schroyer left your place?

A. No.

Q. Would it have been an hour after they came in, after Ormsbee and Brown came in?

A. No, I wouldn't say that.

Q. Would it have been a half hour?

A. It could have been.

Q. Would you say it was approximately five o'clock?

A. I wouldn't say.

Q. Can you tell us how long Brown and Ormsbee were in your place?

A. I say 15 to 20 minutes.

Q. And at the end of that 15 or 20 minutes was the period when Ormsbee left?

A. I will say something like that.

Q. So you have previously testified that they came (62) in 4:15 to 4:30, you mean that they would have left at any time from 4:30 onward, is that correct?

A. No.

Q. What time would they have left?

A. If they come in at 4:30 they wouldn't have left at 4:30.

Q. You said they came in between 4:15 and 4:30; what is the earliest they might have left?

A. Well, around five or a few minutes after, I'd say.

Q. Then was Schroyer in your place for a total of an hour and a half?

A. I'd say close to that.

Q. How long was he in there before Brown and Ormsbee came along?

A. Well, long enough to eat a couple of sandwiches, drink a small bottle of beer, visit me.

Q. Well, that could be almost any length of time. Was he there a half hour before they came in?

A. I didn't pay particular attention to the time.

Q. Did Mr. Schroyer engage in any conversation with you at that time about the amount of money he was making?

A. I don't think he did.

Q. Not at all?

A. I said I don't think he did.

*Charles Jones—Cross*

(63) Q. Did he say anything about making a pretty good percentage on this trip?

A. No.

Q. Did he say he could make good money if he had no bad luck?

A. No, he didn't say anything like that.

Q. Was there no discussion about making money in your presence, either with you direct or with Ormsbee and Brown?

A. He said if he could get three trips he could make pretty fair.

Q. Who was present when he said this; was that to you or to Ormsbee and Brown?

A. To me.

Q. To you alone?

A. Yeah.

Q. In your presence did Mr. Schroyer tell Mr. Ormsbee or Mr. Brown that if they didn't believe him they could go along and he would show what he would draw on the trip even with his bad luck?

A. How was that?

MR. WEBER: Will the reporter read that.

(Question read:)

A. I wasn't present if he told that.

Q. Mr. Jones, do you remember testifying in the Erie (64) County courthouse on August 13, 1956, in the taking of depositions having to do with this case, before a court reporter, and being sworn by Marie Singer, deputy prothonotary of the Erie County Court of Common Pleas?

A. I remember being there, yes.

Q. You remember you were asked some questions and made some answers?

A. That's right.

Q. Do you remember the following questions and answers: Question: "Well, in what way and to the best of your recollection, what was the question,"—"what was the conversation?"—correction.

Answer: "Well, if I remember right, the way he says was they didn't need to take his word for it, if one of them would go along he would show them what he drew to the load after having his bad luck, or some words to that effect."

Question: "Well, when he said that, Mr. Jones, that they didn't have to take his word for it, did that indicate that they had said something that showed they didn't believe him?"

"No, I don't think they did, not to my knowledge."

And further, at the same time, you were asked the question, "How did he say it?" "I think he said if one of them would go along he would show them how much he (65) would draw on this trip after having his bad luck."

Do you recollect those questions and answers?

A. I don't remember him wording it that way. I remember saying he would draw some after he got there with what bad luck he had.

Q. Do you recollect whether or not those were the questions posed to you and the answers which you gave at that time?

A. You got the answer down there.

Q. Would you like to look at them in writing?

THE COURT: He's read you, Mr. Jones, your testimony at the deposition hearing. Do you recall giving that testimony, assuming that those answers are



*Charles Jones—Cross*

the answers that the reporter took down at the time, do you remember stating the proposition that way?

THE WITNESS: Read that over again.

THE COURT: Let him look at it. The point is, those are not followed consecutively.

MR. WEBER: There was a gap, but you can begin here, where it says "Q", where it says "A".

THE COURT: Read the question and answer.

THE WITNESS: Yeah, yes, I remember saying that one.

Q. You remember saying that much?

A. Yeah.

(66) Q. Will you read down here and over on the next page, and I ask if you remember saying those things?

A. "I made that much money." What do you mean by "that much"?

Q. Mr. Jones, those are your very words.

THE COURT: Let's not talk about—if you want to call his attention to something more to read, question him.

Q. Have you read down to there (indicating), do you recollect saying those things?

A. Yes, I do.

Q. Were they the truth?

A. You wouldn't expect me to swear to a lie, would you?

Q. No.

A. That must have been the truth then.

Q. It was the truth. It was the truth at that time when you swore to it, is that correct?

A. It would have to be if I swore it.

Q. That would be the—is it the truth today?

A. If I swore to it, yes.

Q. Was there any conversation between Mr. Schroyer and Mr. Brown to the effect that if the amount of money which Schroyer claimed you could earn was true, Brown might buy a rig and go into the trucking business himself?

A. That's right.

(67) Q. Is it true then that the purpose for Mr. Ormsbee going on this trip as far as you know, was to investigate the profit that could be derived from this kind of operation?

A. Yes, sir.

Q. Were there any other words said of any kind to indicate what other work of any kind might be expected of Mr. Ormsbee for the \$25?

A. Not in front of me.

Q. Did Mr. Schroyer ask you if there was any place in town that he could sell a tire?

A. Yes, sir.

Q. Did you tell him there was any such place that you knew of?

A. I told him I didn't know of any.

Q. Do you have any idea why he wanted to sell a tire?

A. No, he didn't tell me that.

Q. Did he try to borrow any money?

A. No.

Q. You have testified that the driver was talking about having trouble with his rig?

A. That's right.

Q. Do you specifically remember what kind of trouble he said he was having?

(68) A. Brake trouble and tractor trouble.

*Charles Jones—Cross*

Q. What do you mean "tractor" trouble?

A. The tractor didn't work right.

Q. What didn't work?

A. He didn't explain that.

Q. Recalling again your testimony on deposition, and referring to page 5 of the record of that deposition, do you recollect you were asked the question, "What other bad luck did he complain of on this particular truck?"

Answer: "On the tractor."

Question: "What kind of bad luck did he have on the tractor?"

Answer: "Well now, that there, he just didn't tell me the bad luck he had. He said he had had bad luck with the tractor."

Do you recollect that?

A. Yes, sir.

Q. And now referring to page 10 of the transcript, beginning with line 5 you were asked the question, "Was there any conversation in your presence concerning any defective mechanism on the truck?"

Answer: "On the tractor?"

Question: "Either one, the tractor or the trailer?"

Answer: "Nothing more than I have told you."

Referring to the same testimony, Mr. Jones, page (69) 15, referring to those two series of questions and answers, Mr. Jones, I ask you if the answers which you gave at that time were the truth as far as you know it, with regard to his statements?

A. Yes, sir.

Q. Can you say with any particularity what kind of trouble Mr. Schroyer complained of?

A. Brakes for one thing, and trouble with the tractor, that is all.

Q. At the time of this prior deposition, you did not mention brakes, and you said you didn't know of any other trouble, isn't that true?

MR. GORNALL: I object to that, because he did.

THE COURT: Whereabouts?

MR. GORNALL: Page 63, your Honor.

THE COURT: Call his attention to it.

MR. GORNALL: Line 21, Mr. Weber.

MR. WEBER: I see that.

THE COURT: Do you wish to withdraw that question?

MR. WEBER: I will withdraw that question.

Q. Do you recall what he did say about his troubles, his brake troubles?

A. I don't remember whether he told me it wouldn't hold his load or not, what it was.

Q. Had he mentioned that he had other kind of trouble (70) with the truck and tractor?

A. The trailer he did.

Q. Now, was this in the presence of Ormsbee?

A. No, he was telling me that before they came in.

Q. He was telling you that before they came in?

A. Yeah.

Q. Before they came in did he inquire around about hiring anybody to go with him anywhere?

A. No.

Q. Was that a conversation that developed after Brown and Ormsbee came in?

A. Yes, sir.

*Charles Jones—Redirect*

Q. And do you have any knowledge from what he said of what duties were to be performed for the \$25?

A. That is the second question you asked, the same one.

Q. Yes, I know.

A. Yes, I answered it.

Q. What is the answer?

A. The same as I told you the first time.

Q. I don't remember the first. Answer it.

A. Look it up and see.

THE COURT: You just answer.

THE WITNESS: All right, ask the question.

MR. WEBER: Would the reporter repeat the question.

(71) (Question read.)

A. Nothing about what duty would be performed.

Q. Is that correct?

A. That's right.

MR. WEBER: That is all.

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*Redirect Examination*

BY MR. GORNALL:

Q. I just want to refer to this same deposition, at page 65, and read you these questions and answers, so we can clear up this one point.

Question: "What did he say the nature and"—I am on page 65—"What did he say the nature of the trouble was on the tractor-trailer?"

Answer: "Mostly brakes."



Question: "What did he say about the brakes?"

Answer: "He said they wouldn't hold the load he was carrying."

Question: "Did he say he complained of brake trouble when he called down there though?"

Answer: "Tractor trouble and brakes."

Is that a correct statement?

A. That's correct.

MR. GORNALL: That is all, Mr. Jones.

MR. WEBER: That is all.

(Witness excused.)

(72) MR. WEBER: I'd like to ask you at this time if this is the full and complete testimony that will be offered on the question of agency, the relationship between Aetna Freight Lines and the decedent Ormsbee.

(73) THE COURT: You call it agency; I don't know what to call it.

MR. WEBER: I am not calling it that; that is the general field of law in which this problem comes. Is this the sum total?

THE COURT: I don't know.

MR. GORNALL: I don't know what he is driving at, your Honor. I will wait till we rest our case.

THE COURT: Of course, I don't know the whole case. We all understand the theory of the case on pre-trial as I understand. I am not sure just exactly how they are going to rest this proposition on this \$25, or how it relates to the general theory of liability, if any.

*Adelbert Rice—Direct*

whether he was an employee or whether he wasn't, what that situation is. I think that is a question for the court, don't you?

MR. GORNALL: Yes, sir.

THE COURT: In other words, whether he is on compensation or whether he isn't.

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(135) ADELBERT RICE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Would you give us your name and address, please.

A. Adelbert Rice, 1540 Delaware, Buffalo, New York.

Q. What is your business and occupation?

A. Terminal manager for Aetna Freight Lines.

Q. Terminal manager for Aetna Freight Lines.

Where are you located?

A. Buffalo, New York.

Q. What is the territory that you are terminal manager for?

A. I take care of the Buffalo business, dispatch trucks out of the Buffalo area, New York State area.

Q. Are you not the terminal manager for the New (136) York State area?

A. That's right.

Q. You are the agent for Aetna Freight Lines in New York State?

A. That's right.

Q. Are you a member of management so far as New York State is concerned; is there anyone higher than you in New York State?

A. No, sir.

MR. GORNALL: We'd like to call this man as on cross-examination, as he is the managing agent of the territory of that freight line.

THE COURT: Any objection?

MR. WEBER: No objection.

THE COURT: All right, you may cross-examine.

Q. Mr. Rice, on or about March 13, 1956, did you receive an order to pick up a load of 36,000 pounds of steel at the Crucible Steel Works, Syracuse, New York, to be shipped to Midland, Pennsylvania?

A. Yes, sir.

Q. State whether or not you know who picked up this load of freight consigned to Midland, Pennsylvania?

A. Yes, sir, I did.

Q. Pardon?

A. Yes, sir, I did know.

(137) Q. Who did receive it?

A. Schroyer.

Q. Charles Lester Schroyer?

A. Schroyer.

Q. What was the date that Mr. Schroyer picked up this load of steel?

A. I believe it was on the 13th.

Q. Of—

A. March.

Q. What year?

A. 1956.

Q. And state if you know the distance from Syracuse, New York to Batavia, New York, please, in miles?

A. Approximately a hundred ten miles.

*Adelbert Rice—Cross*

Q. State if you know the distance in miles from Batavia, New York, to Buffalo, New York?

A. Thirty miles.

Q. The distance from Buffalo to Erie?

A. Ninety miles.

Q. Do you know the distance from Erie to the scene of the accident, just east of East Rochester, Pennsylvania?

A. No, sir, I do not.

Q. This load of steel was picked up March 13, 1956, by Mr. Schroyer; when was the next that you heard from Mr. Schroyer, if you did?

(138) A. The following Thursday.

Q. What date would that be?

A. The 13th,—

Q. Could you tell us the day of the week that the 13th fell on; would that help you?

A. If I knew what date the 13th of the week—

MR. WEBER: May we stipulate the 13th was a Tuesday and the 20th was a Tuesday, figure the other dates from there.

Q. Then what date was the next date that you heard from him?

THE COURT: The government furnishes us with calendars. I have two years on it, so we can look at that. I didn't hear him say yes.

MR. WEBER: Is that agreed between counsel? Here is the calendar.

MR. GORNALL: I think that we can.

THE COURT: All right, let's go ahead.

Q. What was the next date?

A. I believe it would be the 15th.

Q. The 15th, that would be on a Thursday then?

A. I believe it was on a Thursday.

Q. And will you tell me the circumstances surrounding the next time that you heard from Mr. Schroyer?

A. The following Monday morning.

(139) Q. No, no, I am speaking about this Thursday, please. What happened that he happened to get in contact with you or you with him?

A. He came in Buffalo wanting some money.

Q. What was the reason he wanted money?

A. He had tire trouble.

Q. And where was the outfit?

A. Batavia.

Q. And what did you do?

A. I had him call his boss, Mr. Fidler. I could not advance him the money without his permission.

Q. Do you know whether or not he called and asked for money?

A. Yes, sir, he did.

Q. Did he receive any money?

A. Yes, sir.

Q. And when was the next that you heard from Mr. Schroyer after that?

A. The following Monday, Monday a.m.

Q. And what were the circumstances surrounding that?

A. He was at the office when I opened the office that morning.

Q. Yes?

A. His truck—he had been at the hotel over the (140) weekend, and his truck wouldn't start due to the cold weather, he had run the battery down. I sent another man and a battery up to try and start him, it wouldn't start.



*Adelbert Rice—Cross*

Q. Do you know whether or not Mr. Schroyer lost a tire or a wheel, rather?

A. I believe he did.

Q. Do you know where he lost that wheel?

A. Around Batavia, wherever the truck was. Batavia is all I know.

Q. What is the normal driving time, if you know, from Syracuse, New York, to Midland, Pennsylvania, with a load of steel such as Mr. Schroyer was carrying?

A. Well, I don't know. A lot depends on the weather.

THE COURT: Did I understand on Monday morning his truck was at Batavia?

THE WITNESS: No, Monday his truck was at Buffalo. He had gotten his tires fixed and come into Buffalo.

Q. You are not equipped to state what the normal driving time would be then?

A. Well, I could figure it out.

Q. Would you do so, please.

THE COURT: That is via Buffalo is it, Syracuse to Buffalo and Erie, on that route?

MR. GORNALL: That is correct, your Honor.

A. It would take from Erie—from Syracuse to (141) Buffalo, normal conditions, it would be probably about six hours, six—how many miles is it from Buffalo to Rochester, Pennsylvania? I don't know just where Rochester is, I have never been—

MR. GORNALL: I think we can stipulate it is about—

*Adelbert Rice—Cross*

MR. WEBER: If your Honor please, we object to further questions of this type because there is no evidence here to show that this is the driving pattern of this driver, that there were any stops or anything else. We don't think the normal driving time from town to town is material.

MR. GORNALL: I think it is, your Honor, to show it took seven and a half days, and the claim he had trouble certainly is material we think.

MR. WEBER: If they want to inquire why it took that length of time, all right.

THE COURT: The witness doesn't know exactly how far it is from Erie to Beaver Falls.

Q. Do you recall testifying on March 19, 1957, on deposition at the Erie County Courthouse?

A. Yes, sir.

Q. And do you recall this question on page 8, Line Number 1: Question: "He picked the load up on the 13th and he had to go how far from Syracuse to Midland?"

(142) Answer: "Approximately 350 miles."

Is that a true and correct statement?

A. Yes. I think if I remember right now, we figured out the mileage there that day.

Q. Then you would say here it is about three hundred—

A. About 350 miles.

Q. Then on page 8 of the same deposition: Question: "What would the normal transit time be from Syracuse to Midland on such an outfit?"

Answer: "Ten hours driving, take a break, eight hours rest, then another couple hours. I would say 12 hours' actual driving time."

*Adelbert Rice—Cross*

Is that a true and correct statement?

A. That is for an average time.

Q. Now on the morning of March 20, 1956; did or did not Mr. Schroyer come in to your terminal in Buffalo?

A. He came, he was at the office when I opened the office that morning.

Q. What time was that?

A. A little after eight.

MR. WEBER: If your Honor please, I believe the witness is confused. I'd like to have that question read again to him and have his answer.

THE COURT: I don't see anything confusing about it.

(143) MR. GORNALL: The question was, as I phrased it, "What time did Mr. Schroyer arrive at your terminal on the morning of March 20, 1956?" That is the Monday morning—Tuesday morning.

MR. WEBER: That's the confusion I think is about the calendar.

THE COURT: I checked the calendar; it is correct.

MR. GORNALL: Tuesday, your Honor.

THE COURT: Tuesday.

Q. Then it would be Tuesday morning.

A. Tuesday, the 20th.

Q. And it was eight o'clock, you say?

A. Approximately.

Q. Did Mr. Schroyer at that time complain—

A. Pardon me. Is this a Monday morning or a Tuesday morning?

Q. The 20th is Tuesday.

THE COURT: Tuesday the 20th.

A. Tuesday, it wasn't at eight o'clock that morning. No, it was later in the morning, sometime during the morning. I don't know exactly what time it was. He was there Monday morning when I opened the terminal.

Q. What time?

A. A little after eight when I opened the terminal (144) up.

Q. Then he was there again Tuesday?

A. Yes, sir.

Q. State if you know why he laid over?

A. Monday morning is the morning that his truck wouldn't start at the hotel.

Q. Then he laid over another day?

A. That's right.

Q. Then he came in on Tuesday morning to your terminal again?

A. That's right.

Q. Did the truck driver, Mr. Schroyer, on Tuesday morning complain to you about brake trouble?

A. He said they weren't applying as fast as they should.

Q. Did he or did he not complain about brake trouble?

A. That's the only complaint he had.

Q. Did you or did you not make an inspection of the brakes?

A. I did.

Q. And what did your inspection consist of?

A. I had him pull the hand valve down while the truck was standing still to see if—there was ice and snow had been on the road—and the arms all moved. I pulled

the truck ahead and tried the hand valve which applies (145) the trailer brakes only, and it worked; leaving the hand valve down, put it in low gear, I tried to pull the truck ahead, it wouldn't move, the brakes were locked, they were holding.

Q. Now over what area did you drive the truck to check the brakes?

A. Oh, probably between two, three, 400 feet.

Q. Three or four hundred feet; did you take it out on the street?

A. No, sir.

Q. Where did you take it?

A. In the yard.

Q. In the yard.

A. Yes, sir.

Q. Would you describe the yard to us?

A. It's a blacktop driveway.

Q. A blacktop driveway?

A. That's right.

Q. You checked the brakes in this blacktop driveway?

A. That's right.

Q. What is the maximum speed that you got the truck up to?

A. Oh, I'd say maybe five, seven miles an hour.

Q. Five to seven miles an hour, then you checked the brakes, applied the brakes; is that correct?

(146) A. That's right.

Q. Is this a level area that you checked the brakes on?

A. Yes, sir.

Q. State, if you know, the time that Mr. Schroyer left your terminal on this--



*Adelbert Rice—Cross*

A. It was during the morning; I don't know the exact time.

Q. Now again referring to the same depositions, at page 24, lines 11 to 20, Question: "What did he say about the brakes on the trailer?"

Answer: "What did he say about them?"

Question: "Yes, the condition of them."

Answer: "He complained."

Question:—

MR. WEBER: If your Honor please, I object. I don't believe the witness here has denied making any particular type of statement at that time. It is not proper to read this testimony unless he has. Let him ask the questions directly.

THE COURT: Do you think it is inconsistent with what he said?

MR. GORNALL: Not tremendously, your Honor.

THE COURT: You can interrogate him.

MR. WEBER: Ask him the questions.

(147) THE COURT: Interrogate him. If it is inconsistent, I will permit you to read the questions.

Q. You say he complained about the brakes?

A. That's right.

Q. How did he complain?

THE COURT: Well now, you have asked him that before; let's not bring it out again. You asked him what he had said. If you want to go into any details, let's not do the same thing.

*Norman Ormsbee—Direct*

Q. Did he say anything further about, complaining about the brakes?

A. Not that I recall, no, sir.

THE COURT: Did he mention at all how long, any period he was having trouble with the brakes, anything of that kind?

THE WITNESS: No, sir, he did not.

Q. Do you know any inspection made of this tractor-trailer outfit by the Aetna Freight Company before the load was picked up on March 13, 1956?

A. No, sir, I do not.

MR. GORNALL: That is all.

(Witness excused.)

(196) NORMAN ORMSBEE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Your name and address, please?

A. Norman Ormsbee, Waterford, Pennsylvania.

Q. And were you related to the deceased, Norman Ormsbee, Jr.?

A. Yes, sir, he was my son.

THE COURT: Speak up.

THE WITNESS: My son.

Q. What was the date of the birth of your son?

A. July 29, 1935.

Q. And how old was he at the time of his death, Mr. Ormsbee?

*Norman Ormsbee—Direct*

A. Almost 21.

Q. Do you know the date of the marriage of your son, (197) if he was married?

A. Yes.

Q. What?

A. I don't know the exact date.

Q. Mr. Ormsbee, could you tell us how many years prior to his death your son was married?

A. Three.

Q. Three years prior to his death. Mr. Ormsbee, state whether or not your son ever worked for you, and if so, where?

A. In the wrecking yard at Waterford, and also in Florida. The wrecking yard we wreck automobiles for scrap, iron ore, and for parts.

Q. Both in Waterford and Florida?

A. That's right.

Q. Whereabouts in Florida?

A. Whitehouse.

Q. Whitehouse, Florida?

A. Yes, sir.

Q. And how much of the time from the time of your son's marriage to the time of his death, was he with you either in Waterford or Florida?

A. Oh, maybe 50 per cent.

Q. And this 50 per cent of the time, referring to this specifically, how much of this time did he work for (198) you?

A. Well, he would work out and when he wasn't busy working out, he'd help me at home.

Q. And you say he worked out, and what do you mean by that?

A. Well, he worked for contractors laying brick and so on, and so forth.

Q. Was he on day rate or how did he work?

A. When he laid chimneys and stuff like that, why he made more than labor rate. On the highway he'd make labor rate. I think that was it.

Q. State if you know the rate that your son received when he worked on a labor crew or laying chimney, laying brick for chimneys?

A. On brick I think it was 2.16, but on labor it was anywhere from around a dollar and a half, pretty near two dollars.

THE COURT: Are you talking about the hourly rate?

THE WITNESS: Yes, hourly rate.

Q. How long a period of time did your son lay bricks?

A. That I wouldn't know, because I was in Florida part of the time.

THE COURT: Keep your voice up, keep it up.

Q. When your son worked for you, how would you pay or recompense your son for the work he did for you?

(199) A. Well, I'd give him money at times and if there was a car he wanted or something like that, I'd let him have that.

Q. Do you keep any records of the amount of money that you paid your son or the—

A. No, sir.

Q. What was the reason for this?

A. Well—well, when I let him have a car, if he wanted to sell it, it was all right, then he'd give me part of the money.

*Norman Ormsbee—Direct*

Q. You are speaking of a car that you junked?

A. No, he would take good cars and fix them up. If there was one he wanted to drive he'd drive it and also have it for sale, see.

Q. You say he fixed cars up?

A. Yes, sir.

Q. How would he fix cars up?

A. He was a mechanic, he worked at Humes' Garage in Waterford some.

Q. How long a period of time if you know did he work at Humes' Garage in Waterford?

A. Oh, my. Six months. I don't know how long.

MR. WEBER: If your Honor please, I'd like to interpose an objection at this time.

(At side bar.)

(200) MR. WEBER: At the outset of this suit we asked on discovery for a list of all the places known to the plaintiff where the decedent had been employed, and later we served a request for admissions which I have here. The testimony there was no time was it disclosed to us that he worked for a road contractor. When it comes to Humes' Garage at this time that is contained in the material in the answer for the request for admissions.

I would like to confine this to the material which has been admitted. This witness obviously is unfamiliar with the employment record because there is a great variance between the answers we are getting here, and the specific material in the request for admissions.

THE COURT: Did they answer that request for admissions?



MR. WEBER: Yes.

MR. KNOX: We said the things listed were true. We didn't know if there was any more.

THE COURT: Let's see the answer.

(Handed to the court.)

MR. WEBER: That is based on prior interrogatories asking for all of the places, and those are the result of our investigation of all of the places found from the interrogatories.

THE COURT: Well, they admit—I don't see any-  
(201) thing inconsistent with that.

MR. WEBER: They put a witness on the stand who says he worked for six months here; we have material showing twenty hours total over three years, which has been admitted.

THE COURT: Well now, you have used that in the form of a request for admission. On a matter of this kind I don't know whether that is proper or not, that you could come in and compel a wife and children here to admit that about a workman 20 years old. I think it is a picayunish matter to talk about.

MR. WEBER: We are still entitled to know how much he earned and how much he contributed—

THE COURT: I think you are. I think that is what they are trying to show. If they don't show anything it is all right, still they have not denied the fact, the admissions, so I am going to let him go ahead. They are entitled to show what they can, you are entitled to cross-examine, put in your evidence.

Proceed.

*Norman Ormsbee—Direct*

(In open court.)

THE COURT: Go ahead.

MR. GORNALL: Do you have the last question?

He worked at Humes' Garage, I have it.

Q. When he worked, what was the nature of his employment (202) there at Humes' Garage, if you know?

A. Well, he put farm machinery together and worked on the trucks and cars.

Q. Did he work on the motors, if you know?

A. Yes, sir.

Q. Did he work on radiators, if you know?

A. Probably took them off. I don't think he worked on the radiators himself. I mean repairing it.

THE COURT: You want to confine it here, it is obvious you are in a field this witness probably doesn't know.

Q. State if you know whether or not the deceased worked at the Erie Malleable Iron Works?

A. I believe he did.

Q. Do you know or not whether he worked there?

A. I am not positive.

Q. State if you know whether or not he worked at the Pennsylvania Railroad Company?

A. Yes, he did.

Q. State if you know the wages that he received per hour or per week working for the Pennsylvania Railroad Company?

A. He worked for the hour, but I don't know how much he received.

Q. State if you know his duties with the Pennsylvania (203) Railroad Company?

A. I believe he was a laborer.

Q. What was the arrangement that you had with your son when he worked for you in junking cars?

A. Well, he took the truck and the torches and went out and junked with them, and he bought the gas and the air and so on for to run the torch, and I gave him the money, all that. He helped me in return if I wanted something done.

Q. Was he or was he not in business for himself?

A. To a certain extent, yes, sir.

Q. What do you mean by "certain extent"?

A. Well, he done the buying and the selling according to his own judgment.

Q. State if you know the average weekly wage that your son made while he was in this business that you spoke of?

A. That's pretty hard to tell. Maybe fifty and up and some weeks, why if he didn't get, you know, if he didn't buy much stuff, why he didn't make much.

Q. Did your son adequately feed and clothe his family?

A. At all times.

Q. Was he a good father to your knowledge to his family?

(204) A. Yes, sir.

THE COURT: Now wait a minute. That is a general proposition. He fed and clothed his family. Now you know it is a pecuniary loss for him. It is all very well to talk about these other things, but the law still is money, the type of care isn't competent.

MR. GORNALL: I think that is all I have, your Honor.

*Norman Ormsbee—Cross*

**THE COURT:** Cross-examine.

**MR. WEBER:** I'd like to make a note on the record.

**THE COURT:** Wait a minute. What have you got?

**MR. WEBER:** If your Honor please, I intend to pursue a line of cross-examination, I wish to make an offer of proof.

**THE COURT:** You don't make an offer of cross-examination. If there is anything wrong, he will object I assume. I assume lawyers protect their own interests. Go ahead.

*Cross-Examination*

**BY MR. WEBER:**

**Q.** Was your son licensed to drive an automobile in Pennsylvania?

**A.** Yes.

**MR. GORNALL:** I object to this, your Honor.

(205) **MR. WEBER:** That goes to his pecuniary loss.

**THE COURT:** I think he is entitled to ask that. Go ahead.

**MR. WEBER:** He's answered it, anyway, he said "Yes".

**THE WITNESS:** Yes, sir.

**Q.** When?

**A.** I think when he was 16.

Norman Ormsbee—Cross

Q. At any time after he was 16 was that privilege taken away from him, to your knowledge?

MR. GORNALL: I object to that, your Honor.

A. I wouldn't know.

THE COURT: He doesn't know.

Q. You don't know?

A. No, sir.

Q. You don't know whether or not his license was revoked?

A. No, I lived in Florida.

Q. You lived in Florida?

A. Part of the time.

Q. I ask you if you recollect in 1953 the conviction of, or—

MR. GORNALL: Your Honor, he stated he doesn't know.

THE COURT: Just a minute. The only purpose of (206) that, gentlemen, for a man, a young man of this kind how he gets work in trucks and garages, so on. The question of whether or not he was convicted or lost it has nothing to do with this. We are talking about the possible effect on his earning power.

MR. WEBER: This has an effect on his earning power, your Honor.

THE COURT: He had a license, he doesn't know whether or not he lost it. That is the end of that. If you want to show that, that is a different proposition.

MR. WEBER: He has said he had a license when he was 16. I am cross-examining his knowledge of this.



*Norman Ormsbee—Cross*

**THE COURT:** He said he doesn't know whether or not he lost it. You want to show a conviction of some kind, you are prohibited from doing it.

**MR. WEBER:** His conviction has to do with the automobile license.

**THE COURT:** Aside from the ruling of the court, don't you think that I suggested it to you that you not ask him about any possible conviction. The man has said he doesn't know whether he lost his license. Go ahead.

**MR. GORNALL:** I'd like to state for the record I will ask for the withdrawal of a juror because we proceeded too far along this line.

**THE COURT:** It isn't that serious.

(207) **MR. KNOX:** I move the court instruct the jury to disregard it.

**THE COURT:** The jury will disregard it. I think some ladies and gentlemen from time to time lose their licenses for varying periods, and we are trying this case, relating to this point now that we are talking about, this issue relates to the pecuniary contributions of this young man to his family. One item I suppose is whether or not his license has some bearing on what he earned. You see why I am disallowing this, he might have lost it for three months, he might have got it back. You get it back eventually after a certain period of time, as I understand the law; no matter what you do, you get it back finally, so we are not concerned with whether or not he lost it.

**MR. WEBER:** If your Honor please, your remarks lead us to further inquire into this.

*Norman Ormsbee—Cross*

**THE COURT:** No, they don't. Cross-examination of this witness is somewhat in the control and discretion of the court. You are talking about a 20-year old, whether or not he lost his license, and the man, the father has said he doesn't know. I am going to leave it at that. If you think he has, you can introduce it, then we can determine whether or not it is relevant.

**MR. WEBER:** We intend to cross-examine the father.

**(208) THE COURT:** You intend to cross-examine on the line the court permits it. Go ahead.

**MR. WEBER:** We intend to cross-examine him further with the court's permission, on his knowledge of the earning capacity of the deceased.

**THE COURT:** Proceed. That is the subject of the cross-examination.

**BY MR. WEBER:**

**Q.** Mr. Ormsbee, would it be correct to say that Norman, Junior, did not work for Humes' Auto more than 20 hours in the past three years, or in the three years prior to his death?

**A.** I don't know.

**Q.** You wouldn't know?

**A.** No.

**Q.** So when you said he worked for approximately six months, was that just a guess on your part?

**A.** Yes. I don't know.

**MR. GORNALL:** I don't think he testified he worked for Hume six months. It is not my recollection.

*Norman Ormsbee—Cross*

**THE COURT:** Well, the jury will remember that.

**Q.** All right. Now you said he worked for the Pennsylvania Railroad. Do you know how long it was?

**A.** No, sir.

**Q.** Would it have been more than five weeks at any (209) time?

**A.** I wouldn't know.

**Q.** You wouldn't know. You said that he worked for Erie Malleable Iron Company; do you know what year that was?

**A.** I didn't say he worked for them. I don't know.

**Q.** You don't know?

**A.** I don't.

**Q.** Did you keep a regular payroll record of any kind during the time that your son worked for you?

**A.** No, sir.

**Q.** Did you make any such things as tax deductions or any such reports of that kind on him?

**A.** No, sir.

**Q.** You did not. In return for this work did you sometimes give him free rent or food or clothing instead of money?

**A.** I built him a house.

**Q.** You built him a house?

**A.** Yes.

**Q.** Where was that?

**A.** In Florida.

**Q.** Was that in return for the work he did for you?

**A.** I built it for him to live in, but not in return for work.

**Q.** It had no relation to the work that he did?

(210) **A.** I suppose if he hadn't done for me I wouldn't have done anything for him.

*Norman Ormsbee—Cross*

Q. When he did actually work for you, was he on any regularly or recognized hourly or weekly pay rate?

A. I think at that time he worked at the Anchor Hocking Glass Company, or Tropical Glass Company, which is changed now, or bought out. I don't know how it is.

Q. You say at that time; when do you mean?

A. When I was building him the house.

Q. And for how long a period of time was that?

A. I don't know that either.

Q. That was in Florida?

A. Yes.

Q. You haven't any idea how long a period that would have been?

A. No, sir.

Q. What year was that in, do you know?

A. I believe '54.

Q. Do you know of any other places that your son worked?

A. I think Winn-Dixie. It is a food shipping-out center, or something like that.

Q. When was that?

A. I think that was about the latter part of '54 and '55.

(211) Q. Do you know how long?

A. No, I don't.

Q. Would it have been more than one week?

A. Yes.

Q. How long more than one week?

A. I wasn't home too much, so I wouldn't know.

Q. What was his job at Winn-Dixie, do you know?

A. Bagging fruit and potatoes, I think.

*Norman Ormsbee—Cross*

Q. Would it have been correct to say that he worked for one week in the first quarter of 1956 for Winn-Dixie?

A. It is possible. I wouldn't know.

Q. Do you know of any place where your son was steadily employed for more than two months, Mr. Ormsbee?

A. I never paid that much attention.

Q. Did you supply your son and his family at any time with gifts or supplies of food or clothing, either as a gift or in return for work that he had done?

A. Oh, sure.

Q. Did you charge them any rent for living on your property in Waterford?

A. No.

Q. They did live on your property in Waterford, did they not?

A. He took care of the wrecking yard.

Q. You own a property in Waterford, you have the wrecking yard there?

(212) A. Yes.

Q. Is there a trailer, was there a trailer on that property in which they lived?

A. Yes, sir.

Q. And did they pay any rent for that?

A. Well, when they lived in the trailer I think they paid my sister, or my daughter rent for the trailer.

Q. Your daughter?

A. Yes.

Q. Was that on your property?

A. Yes, sir.

Q. And did you charge them anything in any way?

A. (Shaking head.)

Q. Or require any certain amount of work for that?

A. No, sir.



*Joan Ormsbee—Direct*

THE COURT: You mean the daughter owned the trailer?

THE WITNESS: Yes, sir.

Q. Tell us how far Norman went in school?

A. Eighth grade.

Q. Do you know if he finished the eighth grade?

A. I don't know if he got a diploma or not, but I think he did.

Q. You don't know for sure, is that correct?

A. I can find out.

(213) Q. But you don't know?

A. No.

MR. WEBER: That is all.

MR. GORNALL: That is all I have.

(Witness excused.)

JOAN ORMSBEE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. GORNALL:

Q. Would you state your name and address, please.

A. Mrs. Joan Ormsbee, Waterford, Pennsylvania.

Q. You will have to speak a little louder please.

A. Mrs. Joan Ormsbee, Waterford, Pennsylvania.

Q. How old are you now?

A. Nineteen.

Q. And were you married to Norman Ormsbee, Jr., now deceased?

A. I was.

Q. What was the date of your marriage?

A. November 10th, 1953.

*Joan Ormsbee—Direct*

Q. 1953?

A. M-hmm.

Q. And were there any children born either before (214) this marriage, to yourself and Norman Ormsbee, Jr., or after the marriage?

A. Yes, there was.

Q. And what are the names and ages and dates of birth of the children?

A. William Ormsbee and he was born June 25, 1953, and Norma Jean Ormsbee, July 24, 1954, Carol Ann Ormsbee, August 27, 1955.

THE COURT: Talking about birth dates, what is your birth date?

THE WITNESS: November 5th, 1937.

THE COURT: All right, go ahead.

Q. State if you know the date of death of your husband?

A. March 20, 1956.

Q. I show you Plaintiff's Exhibit—

(Whereupon funeral bill, Schweikert Funeral Home, was marked Plaintiff's Exhibit No. 9 for identification.)

Q. —Exhibit 9 and ask you if you can identify this?

A. This is the funeral bill.

Q. For the funeral of who?

A. My husband Norman.

Q. Who was it tendered by?

A. Schweikert's.

(215) Q. Speak up.

A. Schweikert Funeral Home.

*Joan Ormsbee—Direct*

Q. Who was it tendered to?

A. Me.

Q. And what is the amount of that funeral bill?

A. \$1009.50.

Q. And has any of this funeral bill been paid?

A. No.

Q. Well, I see a notice on here, "March 22, 1956 received from Amos Lester \$100".

A. That was paid to the funeral home in Rochester where he got the body released to bury.

Q. Now Mrs. Ormsbee, would you state whether or not the three children that were in the back of the courtroom earlier this morning are your children?

A. Yes, they are.

Q. Did your husband during the time that you were married, adequately clothe and feed you and your children?

A. Yes, he did.

Q. And provide you shelter?

A. Yes.

Q. Did or did not your husband during your marriage have a job all of the time?

A. He was either working for a company or for his father.

(216) Q. Was your husband ambitious?

A. Yes.

Q. Did your husband have any special training or skills?

A. He was a mechanic.

MR. WEBER: Sir, I can't hear.

Q. Speak louder, please.

THE COURT: She said he was a mechanic. Speak up. It is your case. Talk up so people can hear you.

*Joan Ormsbee—Cross*

Q. Did he have any other skills?

A. No.

Q. What was the average weekly wage that your husband earned during the marriage, if you know?

A. I'd say about \$45 a week.

Q. Did this vary?

A. Yes.

MR. GORNALL: I think that is all I have, your Honor.

THE COURT: Cross-examine.

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*Cross-Examination*

BY MR. WEBER:

Q. When you say average week wage 45 a week, do you mean that is the average weekly wage while he was working or he averaged that every week in the year?

A. No, not every week he didn't.

(217) Q. That is the average when he was employed, is that what you mean?

A. Yes, when he was employed or when he was junking.

Q. How many weeks in the year in any of the three years that you were married was he employed by anyone except working for his father?

A. Do you mean by a corporation?

Q. By anyone except his father, that paid him wages?

A. He worked for Malleable Iron.

Q. When, and how long?

A. In fifty—no, '54, and he worked about five or six months. I wouldn't say just when, I mean how long, because I don't know.

*Joan Ormsbee—Cross*

Q. Do you know the date? You say '54, is that it?

A. In the summer of '54.

Q. What?

A. He started working just after we come back from Florida.

Q. Would it be correct to say that he worked for Erie Malleable Iron from May 23, 1955 to October 7?

A. It might have been '55.

Q. Yes. Is that the longest job for any outside employer aside from your father-in-law, that he ever held?

A. Yes.

(218) Q. That is, is it not?

A. That I know of.

Q. That you know of. Were you living together all of the years of your marriage?

A. Yes, we were. He could have worked before I was married, though.

Q. Well, how old was he when you were married?

A. Eighteen.

Q. Now in 1956, before his death, when did you return to Erie County from Florida?

A. We were here about the third of March.

Q. About what?

A. The third of March.

Q. Did he have any job; was your father-in-law here at the same time?

A. No, he wasn't.

Q. You were here yourself, is that right?

A. Yes, we was.

Q. Was your husband employed by anybody from the time you came back, from that until the date of his death?

A. No, he wasn't.



*Joan Ormsbee—Cross*

Q. And I believe that you heard Mr. Brown, you were here when Mr. Brown testified yesterday, is that correct?

A. Yes.

Q. On the 20th of March when your husband was with (219) Mr. Brown, was he in search of employment?

A. Yes, he was.

Q. He had not worked then for that three weeks, is that correct?

A. He went back to Malleable, they told him to come back, that his old job would be open soon, and he told them that he didn't have too much money with him, when we come up from Florida we only had about fifty extra, and he told them that he needed the job right away. They told him not to get another job because they would have his old job back for him.

Q. But he did not work from the third of March when he got back, until the date of his death, is that correct?

A. No, he didn't.

Q. Now, how long did you know Norman Ormsbee before you were married?

A. Six or seven years.

Q. Did you know him in school?

A. Yes.

Q. What school did he go to?

A. Waterford.

Q. Do you know how far he went in school?

A. I believe he finished the eighth grade.

Q. Do you know for sure whether or not he finished the eighth grade?

(220) A. No, I don't. I was a year ahead of him in school.

Q. Did he have any special training or any particular

kind of job except for the school training—except for his grammar schooling?

A. You mean a special school?

Q. Yes.

A. No.

Q. You said he was a mechanic; is this something that he learned or picked up, or did he have any special training for it?

A. Well, he worked at cars all his life. He's been around a wrecking yard all his life.

Q. Do you know where he was working when you were married?

A. He was working in Buffalo.

Q. In Buffalo?

A. M-hmm.

Q. Where, do you know?

A. The Chevie plant.

Q. Chevrolet plant?

A. M-hmm.

Q. What was the date of your marriage?

A. November 10th.

Q. Was he working there actually at the time you (221) were married, or just before you were married?

A. Just before we were married.

Q. Do you know if it is true that he worked any more than the following, Chevrolet plant, Buffalo, New York, October 7, 1953, through October 15, 1953?

A. I couldn't say for sure.

Q. Did he work any more than that one week?

A. I don't know.

Q. Now, did he work anywhere else at the time you were married?

A. He worked for his father.

Q. What?

A. He worked for his father.

Q. I am talking particularly at the time of your marriage, where was he employed then?

A. In Union City.

Q. Where?

A. The Snap-Tite.

Q. How long did he work at Snap-Tite?

A. I don't know.

Q. You don't know?

A. It must have been around a month, a month and a half, then he got laid off.

Q. Do you know how much he made at Snap-Tite when you were married?

(222) A. No, I don't.

Q. Would he have made more than a dollar ten an hour?

A. I don't know that.

Q. Now, during the first winter that you were married was he on unemployment compensation?

A. Yes.

Q. For how many weeks did that run?

A. I don't know.

Q. Was it for 16 weeks?

A. It could have been.

Q. Well, you remember testifying at the Erie County Courthouse on this matter last summer, don't you?

A. Yes.

Q. And I read you the following questions and answers, and ask you if they were the questions asked and the answers which you gave:

Question: "You weren't married when he worked for Snap-Tite in Union City?"

Answer: "No. Well, we got married during the time he worked at Snap-Tite."

Question: "Were you married when he was on Pennsylvania compensation for unemployment?"

Answer: "Yes."

Question: "That was for a period of 16 weeks?"

(223) Answer: "Yes."

Question: "When was that?"

Answer: "During the first winter we were married."

Question: "That would be 1953-54?"

Answer: "Yes."

Now after this unemployment compensation period had run, can you tell the next place that he went to work?

A. We went to Florida.

Q. You went to Florida, and did he work down in Florida?

A. No.

Q. Not at all?

A. I don't know. Yes, he did; he worked at Merrill-Stevens.

Q. What is Merrill-Stevens?

A. A shipping yard.

Q. How long did he work at Merrill-Stevens?

A. I don't know. He didn't work too long, and he got laid off.

Q. Would it be correct to say he worked from March 19, 1954 to March 23, 1954?

A. That is about how long.

Q. Just less than a week; is that right?

A. M-hmm.

Q. Do you know what he made there an hour?

(224) A. No, I don't.

*Joan Ormsbee—Cross*

Q. All right. Did he work at any place from the time that he left Snap-Tite shortly after you were married to March of 1954 when he worked for Merrill-Stevens for a few days?

A. He didn't work at a factory.

Q. Did he work at any paying job except for helping out his father?

A. No.

Q. What is the next job—did you stay down in Florida after March of '54?

A. No.

Q. You came back to Erie County?

A. M-hmm.

Q. What is the first job he had in '54 after you came back?

A. I don't know.

Q. Do you know of any place that he was employed in '54?

A. I can't remember right now. There's been so much happened since this has come up.

Q. Well, did he work for Sterling Manufacturers in Erie?

A. Yes, he worked.

Q. How long?

(225) A. I couldn't tell you that.

Q. Mrs. Ormsbee, you remember back at the time this suit was instituted, a request was made on you for supplying the places your husband worked, together with your attorney you wrote out and supplied a list of these places for us?

A. Yes, I looked up the checks, the stubs and checks I had at home.



Q. Do you have that list yet that you made up?

A. No, I don't.

Q. Did you give it to your attorney?

A. Yes.

Q. Do you know if he has it yet?

A. No, I don't.

Q. Do you remember now, aside from that list that was made up—

A. I can remember he worked places but for as long as he worked I can't remember all of them.

Q. Sterling Manufacturers in Erie, did he work there?

A. Yes, he worked there.

Q. Do you know about when?

A. It was in the summer of '54.

Q. Do you know for how long?

A. It must have been about two months.

(226) Q. About what?

A. Two months, three months. I don't know.

Q. Is it correct, Mrs. Ormsbee, to say that he worked from May 5th to June 5th?

A. He worked longer than that, because he was working there at the time that I had my child, and she was born July the 29th, or 25th.

Q. In '50—

A. '4, and he was working at that time.

Q. You think he was working at that time, is that correct?

A. He got changed from the Sterling factory to the ornament fabricators factory. It is the same shop that runs it but there is two different buildings.

Q. Then he was employed by Sterling Manufacturers from May 5 to June 5th, is that correct?

*Joan Ormsbee—Cross*

MR. GORNALL: She's testified he was employed there when the baby was born July 25.

MR. WEBER: I am just testing her recollection of this.

Q. Is that correct?

THE COURT: Proceed.

A. Yes, he worked at least that long.

Q. Did he make any more for that monthly period than \$96.88?

(227) A. I don't know.

Q. You don't know?

A. No, I don't.

Q. After Sterling in 1954, do you know of any other place that he was employed in 1954, aside from working for his father?

A. No, I don't. If he did work, I don't remember.

Q. You lived with him all that year?

A. Yes, I did.

Q. Did you go back to Florida at any time that year?

A. We went back in the fall. No, we went back the first of '55.

Q. But you were in Erie County the remainder of 1954, is that correct, and except for the period at Sterling which I have recited and those wages, did he earn any wages in Erie County in 1954 that you know of?

A. No, not that I know of, that I can remember now.

Q. Pardon me, I didn't hear it.

A. Not that I can remember now.

Q. Well, were there any—as I say, you were asked previously, you compiled a list and the like—were there any further ones that you have tried to search for, any of these places, haven't you?

A. Yes.

*Joan Ormsbee—Cross*

(228) Q. What about 1955; how long was he employed and where was he employed during '55?

A. He worked at the Malleable in '55, I think.

Q. That is the period that you have testified before, is that correct, the summer of '55?

A. He worked at—

Q. What was that?

A. He worked at the box factory, the glass and box factory in Florida.

Q. What is the name of that?

A. Tropical, or Anchor Hocking.

Q. Pardon me; I didn't hear the name of it again.

A. Anchor Hocking Glass and Box Factory.

Q. Anchor Hocking. How long?

A. About a month.

Q. In any of the previous inquiries of ours have you ever supplied that place as a place he was employed?

A. I don't know.

Q. You don't?

A. No.

Q. Any place else that he worked in Florida, or in Erie County in '55?

A. No, I don't believe so.

Q. What is that?

A. I don't think so.

(229) Q. And in 1956, do you know of any particular places?

A. He worked at Winn-Dixie warehouse.

Q. Winn-Dixie. Now long?

A. About three weeks, I believe.

Q. Would it be correct to say that he worked one week and earned forty-nine fifty?

A. No, he worked longer than that.

*Joan Ormsbee—Cross*

Q. That is your recollection. Are you sure?

A. I think so. I believe he worked longer than that.

Q. Do you know exactly the dates?

A. No, I don't.

Q. Now, where did you live when you were first married?

A. In Union City.

Q. And where, what address?

A. It was on Cherry Street, Union City. I couldn't tell you—

Q. How long did you continue living there in Union City?

A. I don't know.

Q. Was that while your husband worked at Snap-Tite that you lived in Union City?

A. Yes.

(235) Q. How long after you were married did he cease being employed at Snap-Tite, do you know?

A. No, I don't.

Q. Well, was it a matter of a few weeks?

A. Yes.

Q. Did you move from Union City then?

A. Not right away.

Q. Well, how long did you remain in Union City?

A. Between three weeks and a month, I believe. I won't say for sure.

Q. Three weeks or a month after you were married, is that it?

A. After he was laid off?

Q. Where did you go then? Did you rent in Union City?

A. Yes.

Q. How much rent did you pay?

A. I don't know.

Q. You don't recollect?

A. No, I don't.

Q. Then where did you move to?

A. I don't know that either, right now.

Q. Did you move in with your husband's father's people?

A. I don't believe so.

(231) Q. Where were you living that winter of '53 when you were receiving unemployment compensation?

A. We lived in my sister-in-law's house trailer.

Q. That is on your father-in-law's property in Waterford?

A. Yes.

Q. Is that correct?

A. M-hmm.

Q. Did you pay any rent?

A. Yes.

Q. To whom?

A. My sister-in-law.

Q. How much?

A. Ten dollars a week.

Q. For how long did that go on?

A. Until we went to Florida.

Q. What was the date that you went to Florida?

A. I don't know.

Q. Well, that was somewhere around March of '54, is that correct?

A. It was in February, I believe.

Q. February. Now during the period in Florida, did you pay any rent to anyone there?

A. No.



*Joan Ormsbee—Cross*

Q. Did you live in the house that your father-in-law (232) provided for you, is that correct?

A. We lived in my father-in-law's house. Our house wasn't built yet.

Q. When your husband was working at Malleable or Sterling, where did you live?

A. We had an apartment on Eleventh Street?

Q. How long was that?

A. About two months.

Q. About two months?

A. M-hmm.

Q. And did you rent that?

A. Yes.

Q. How much was the rent there?

A. \$15.00 a week.

Q. Fifteen a week, for about two months, is that correct?

A. Two or three months.

Q. Did your husband have any brothers?

A. He has a younger brother.

Q. For the most part, since the time of your marriage, has your residence been R.D. 2, Waterford, is that correct?

A. M-hmm.

Q. Is that correct?

A. Yes.

Q. And that is on the property of your father-in-law (233), is that correct?

A. Yes.

Q. And was that in the trailer on that property, is that correct?

A. We lived in the trailer and in my father-in-law's house.

Q. You lived in his house, is that correct?

A. When my husband kept the wrecking yard we lived in his house.

Q. Then when you came back from Union City, or from Erie, or from Florida, there was always a house to go, that is, you'd always go to your father-in-law's property, is that correct?

A. M-hmm.

Q. Did you ever pay your father-in-law any rent or anything for living in that house?

A. No. My husband always helped him.

Q. Now, was there any furniture in any of these homes that your husband bought and paid for?

A. Yes.

Q. What?

A. I couldn't tell you now. We had a breakfast set and beds. The children had, we had two baby cribs.

Q. Was some of this furniture either given or loaned to you by relatives of either your husband or you?

(234) A. We had some furniture given to us, yes.

Q. Pardon?

A. We had some furniture given to us.

Q. You had some given to you, but how much did your husband purchase from earnings?

A. What we needed. He bought the beds and tables.

Q. Do you know how much all told he spent for furnishings?

A. No, I don't.

Q. Have you any idea?

A. We bought a refrigerator, things like that.

Q. What was that?

A. He bought a refrigerator, breakfast set, the children's—what we needed, the crib and high chair.

Q. Is it correct to say that the total purchase price of the articles of furniture that your husband purchased was \$25?

A. No, we gave more than that.

Q. I call your attention again to your testimony previously given in depositions of this case. On page 45 of the record, Question: "Would you tell us what the total purchase price of these items were, approximately?"

Answer: "About \$25."

Question: "And was it paid for or was it simply owed?"

(235) Answer: "It was paid for."

Is that correct?

A. That is what I said.

Q. Do you know of any expenditures over and above those?

A. Well, we gave \$20 alone for the crib.

Q. Is this testimony at that time correct, or is it different at this time, your recollection of it?

A. Well, I don't know whether I forgot about it or what, but we did give that for the crib, because I can prove that.

Q. Did you ever rent in Waterford?

A. Yes.

Q. From whom?

A. Mrs. Hazel Dorman.

Q. For how long a period?

A. About four months.

Q. How much did you pay for that, the rent of that property?

A. We paid \$10 a month. My husband fixed the house.

Q. I didn't hear that answer.

A. We paid \$10 a month, and my husband worked on the house.

Q. How big a house was this?

A. Three rooms.

(236) Q. And was some of the landlady's furniture in it too?

A. Yes.

Q. Now you were confined three times for childbirth, is that correct?

A. Yes.

Q. Can you tell us who paid the expenses, hospital—

THE COURT: We won't go into that.

MR. WEBER: I think it is relevant, your Honor, as to the earning capacity.

THE COURT: If he doesn't pay it he owes it, unless somebody gives it. If he didn't pay it he owes it. I don't think we need to go into that.

Q. Did your husband have any debts at the time of his death?

A. Yes.

Q. What did he owe for?

A. He owed the courthouse.

Q. What did he owe the courthouse?

A. It was a fine.

Q. And how long had that been standing?

MR. GORNALL: I object to going into this.

THE COURT: How much was it?

THE WITNESS: A hundred twenty-five dollars.

Q. Was that the balance due of the fine, or the (237) whole fine?

A. What was due.



Q. And that was left standing, is that correct?

A. Yes.

Q. Had he paid anything on that during the time of your marriage?

A. Yes.

Q. Do you know how far back these payments, he had been making these payments?

THE COURT: Don't let's speak about these things. We don't need to go into all the details.

Q. Did your husband pay medical bills for you or the children?

A. Yes.

Q. To whom?

A. The doctor.

Q. To what doctor?

A. Doctor Meloro.

Q. Did he leave any medical bills owing at the time of his death?

A. Yes.

Q. What?

A. Yes.

Q. He did. To whom?

A. Doctor Meloro.

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(238) Q. Did your husband pay any of the expenses of the—medical expenses of your confinement or—

THE COURT: Well now, will you abide by the court's ruling if you don't mind. If I am wrong you will get a reversal. For the time being, abide by the ruling.

Q. Were there any other debts of any kind left unpaid?

A. Yes.



*Joan Ormsbee—Cross*

Q. What were they?

A. Humes' Garage.

Q. He owed Humes' Garage, is that correct?

A. Yes.

Q. How much?

A. I don't know now.

Q. What was it for?

A. I have the bill at home, but I don't know the exact amount.

Q. Mrs. Ormsbee, is it true that you were to a very considerable extent, you and your husband were helped financially by his mother and father?

A. In return for the work he did for them.

Q. But they did help you financially, is that correct?

A. Yes.

Q. When your husband worked for your father-in-law, (239) did he receive wages in dollars and cents?

A. Not in a pay envelope or anything like that.

Q. What?

A. There was no set hours of working they did.

Q. Did he receive pay in kind such as in food, clothing, or shelter, or the payment for furnishings or any of your needs for living?

A. Yes.

Q. Those would be supplied by your father-in-law, is that correct, for such work?

A. Not all of them.

Q. Now, you gave us an estimate that your husband's average earnings were \$45 a week. How do you derive that average?

A. Well, that would be from the amount of rent that we would have to pay, if we lived in an apartment or home, and the food that we bought and things.

Q. You mean that you are figuring up what it would take you to live?

A. What it did take us to live.

Q. What it did take you to live, and equaling that with what you received from your father-in-law in the line of food and rent and shelter and the like?

A. Yes.

Q. You are then, in arriving at \$45 a week, that is (240) your estimate of money's worth of what you received from your father-in-law, is that correct?

A. No, I didn't say that.

Q. Well, would you explain?

A. I said that was when, for outside work he did, like doing his own work with the truck, what he made there, and for helping his father-in-law, and for the rent of the house.

Q. Mrs. Ormsbee, did your husband ever get his Pennsylvania driver's license back?

A. No, he didn't; he got a Florida license.

Q. And at the time of his death then he did not have one?

A. He had a Florida license.

Q. Can you tell us for how long a period he was without a Pennsylvania license?

MR. GORNALL: Object to this again, your Honor.

THE COURT: I don't think it is important. I am going to admit it, cross-examination of the wife, we will permit it.

How long was he without a license if you know, Pennsylvania license?

THE WITNESS: He lost them in June of '53. He never got them back.

THE COURT: Did he ever apply?

(241) THE WITNESS: No.

THE COURT: He didn't apply?

THE WITNESS: No, he got a Florida license instead.

Q. Just to refresh your recollection, I refer you again to the testimony taken in June, and ask if you didn't explain that an application was made?

A. He wrote in and asked them if he could get a Florida license, they said yes as long as his Pennsylvania license revocation was up.

THE COURT: Anything further?

MR. WEBER: One moment. That is all.

MR. GORNALL: Just one question.

THE COURT: Let's keep it to one; I am trying to finish this witness before lunch.

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*Redirect Examination*

BY MR. GORNALL:

Q. You stated that your husband worked at the Erie Malleable before he went to Florida, isn't that right?

A. M-hmm.

Q. And you said that they offered him a job after he got back just before his death?

A. Yes.

Q. What was the wage he made per hour at the Erie Malleable, if you know?

(242) A. I don't know.

\* \* \* \* \*

*Motion and Reasons for Compulsory Nonsuit*

(249) MR. WEBER: Now comes the defendant, Aetna Freight Lines, and moves your Honorable Court for a compulsory nonsuit of plaintiff for the following reasons: One, the evidence fails to disclose any relationship between Norman Ormsbee, the decedent, and Aetna Freight Lines under which any legal duty was owing by Aetna Freight Lines, in that it is not shown that Norman Ormsbee was in the vehicle with the knowledge or permission of the owner or on any business or purpose of the owner or any business or purpose connected with the owner's business.

For the second reason, the evidence fails to show any negligence on the part of the Aetna Freight Lines which was the proximate cause of the accident in question.

We will give your Honor, and we have a collection of authorities, a rather large collection, from the law of Pennsylvania of very similar situations of such riders who are brought on to vehicles by employees. It has been the general holding of the appellate courts in Pennsylvania that where the driver of a vehicle brings a passenger or allows a person aboard, the driver being a servant of the employer, the owner of the vehicle owes no duty to that passenger except to refrain from wanton or wilful conduct which injures him.

(250). I'd like to call the court's attention to a case that is very close to the point, to the case in question, Byrne vs. Pittsburgh Brewing Company.

THE COURT: I read that case.

MR. WEBER: In which the elements of master-servant appear. The driver had invited the passenger

### *Colloquy*

with an implication at that time the passenger was there to serve some business purpose of the owner, and also the element of defective condition of the vehicle, with all present, in which the court held that the verdict for the plaintiff against the owner could not stand, and of course there is a whole series—

**THE COURT:** You see, Mr. Weber, what you are really doing, your motion on this phase is double-barreled in this sense, that you say the duty owed is to refrain from wilful and wanton misconduct, isn't that correct?

**MR. WEBER:** Yes.

**THE COURT:** Trespass, which really is the same as with regard to ordinary negligence, that he made out no case to the jury unless it comes up to the proposition that the duty an owner owes to a trespasser; isn't that so?

**MR. WEBER:** Further, your Honor, there is no connection between the alleged or imputed negligence, there is no probative connection between the condition of these (251) brakes and the accident. We have no way of knowing whether or not this alleged deficiency of the brakes—

**THE COURT:** Well now, just a minute. There is a very recent case in Pennsylvania, one of you fellows cited it here, where Justice Musmanno says that—he speaks of where a car leaves its own traffic lane, crosses over on to the other side of the highway, or a vehicle leaves a highway altogether, it is evidence of negligence can be inferred—one case it is evidence per se, and in the other case it can be inferred.



### *Colloquy*

In this case can't you say that is at least evidence of negligence? I don't know whether it goes to misconduct. I assume they will argue that the brakes together with the manner in which the accident occurred, will permit the jury to find, one, wilful misconduct.

MR. WEBER: If your Honor will bear with me—

THE COURT: I think maybe that is the way it goes to the jury, I will say that.

MR. WEBER: It is our contention that if the plaintiffs are to rely on that presumption alone, that of the vehicle doing something out of the ordinary, leaving its course, doing something that it would not do except for negligence of the driver, and there is no other explanation, there is a presumption on which they can go to the jury, but here the plaintiffs have not relied on that (252) presumption. You can rely on a presumption up to the point where you produce evidence to prove your point, but where you produce evidence to prove your point, the presumption no longer has value. I think you must rely—

THE COURT: That is wrong. You can add to your presumption by evidence. That's certain.

MR. WEBER: My understanding is that if you introduce evidence you lose the value of your presumption.

THE COURT: That is not my understanding. I'm sorry to say that I had that in two cases going up. On both of them if you take a presumption of due

### *Colloquy*

care, when you can't produce, show lack of due care, you wipe out your presumption, but you can always add to it.

**MR. WEBER:** Where the plaintiff does not rely on a presumption but wishes more, we feel that he must stand on the evidence of negligence that he has produced, and still he has not shown that that negligence was the proximate cause.

Now in the Judge Musmanno case of which you were speaking, in the concurring opinion it was brought out that this is not a case of the presumption of negligence because of the action of the vehicle. Judge Bell said this is a plain, ordinary negligence case, and there is evidence of—

**THE COURT:** Dissenting?

(253) **MR. WEBER:** It was a concurring opinion. He said we should not decide on the exclusive control; he said this is a plain, ordinary negligence case; an accident happened, we do have evidence of negligence, we have the evidence of the truck driver that that vehicle passed at a grade and at an excessive rate of speed.

**THE COURT:** Won't you admit there is some evidence of bad brakes in this case?

**MR. WEBER:** There is some evidence of a brake with a very thin lining, and another one loose, but there is no evidence to connect in any way the happening of this accident with brakes. The jury is going to have to guess that he attempted to step on the brakes and if the brakes would have held prevented

*Colloquy*

him from having this accident, just as they are going to have to guess as to who was driving this vehicle. We have no knowledge of that, we have again an inference—

**THE COURT:** They were very careful to prove this decedent didn't have a driver's license. We don't impute any illegality to him, we will assume he obeyed the law.

**MR. WEBER:** It is important in our view that the jury didn't know he didn't have it because it affects his earning capacity.

**THE COURT:** That is not in issue. They admit that.

(254) **MR. WEBER:** We recollect that, but we feel here, where is the relationship with the driver, with the passenger of the car and Aetna; what was he doing in that vehicle?

**THE COURT:** That is a different proposition. When you talk about that you are talking about something that has some merit to it.

**MR. WEBER:** All right, thank you, your Honor. There are only two witnesses that know anything about why Ormsbee was in this car, or presumed to know, or anything else. Neither one of them testified as to any reason for his being in there, except their assumption. Jones, the bartender, had heard some talk about all the trouble that he had with the vehicle from Schroyer, but he admitted, Jones admitted that there was an understanding and he heard that understanding, that they were disputing the amount of

### *Colloquy*

money that could be made as a truck driver, and an offer was made to show him at the end of the road, and Jones also admits that he heard Brown say "If you can make that kind of money, I think I will go in the business and buy a rig". Brown did not know of any reason why he or Ormsbee were invited or asked to go along, or what the \$25 was to be for. There is not even enough testimony there upon which to base an inference, what the purpose of accompanying the driver was is entirely unproven in this record.

(255) THE COURT: Well, doesn't that then put the plaintiff-decedent in the category of being a trespasser in the vehicle, and it increases the standards of proof required of the plaintiff in order to go to the jury on the issue that plaintiff must prove, as is said in Restatement in numerous cases, misconduct or wanton conduct on the part of the driver.

MR. WEBER: There is no attempt to introduce evidence of misconduct or wanton or wilful misconduct on the part of Aetna here in any way. We feel that Ormsbee was not in that vehicle for anything connected with us in any way.

THE COURT: I want to hear from the other side, what you think you proved in relation to, in view of the decided cases in Pennsylvania, in regard to the relationship between the decedent and the defendant, the defendant corporation.

MR. KNOX: If the court please, the case we have to deal with is Jaeger against Sidewater, cited in 366 Pa. 481. In that case we had a minor plaintiff, a boy who was invited by the driver to get on the truck to

## Colloquy

assist him in making some deliveries, and then given a ride home, and the court said that there is no implied authority to hire an assistant, there must be evidence of an unforeseen contingency, and it is impractical (256) to communicate with the employer making the appointment necessary in order to safeguard the employer's interests.

Now as I say, in the Jaeger against Sidewater case, there was no evidence of any emergency or contingency.

**THE COURT:** That case announces the principle?

**MR. KNOX:** That's right. The question is whether our evidence in this case develops an unforeseen contingency or an emergency arising.

Now we have here the evidence of the two people in the tavern out there. One said that the man had been having trouble with the truck, wanted somebody to go along with him. He didn't know what the trouble was. That was connected with by the other witnesses who said the trouble had been brakes. I think it is a legitimate inference, in view of the trouble he was having, he was fearful he was going to break down on the road, he needed somebody to give him help at that particular point.

It was admitted the man was not going to be taken along to drive; the presumption is he was not driving.

**THE COURT:** It is difficult with that phase. The cases seem to indicate that his duty, why he was taken on, must be defined, must be set out. In the



Pitts-Brewing case, he took him along to show him the road. He said that wasn't a necessity. The driver took the employee (257) of the independent contractor along to show him the long way around.

MR. KNOX: Here now, this man had been having trouble.

THE COURT: The court decision says that is not enough.

MR. KNOX: This man was having trouble with his brakes at Buffalo.

THE COURT: You have to assume. If he had only said—we don't have anything—"I want you to help me put out a flare." He didn't say that.

MR. KNOX: Well, you can infer a lot of things, sure, send a man to make a telephone call when you are broken down.

THE COURT: You better not say he wanted him to make a telephone call. This fellow knew—

MR. KNOX: I think it is an inference the jury can draw from the evidence. Here is a man had trouble with brakes in Buffalo. He stated in Waterford—

THE COURT: What good was this fellow going to do?

MR. KNOX: To help in the case of a breakdown.

THE COURT: What kind of help?

MR. KNOX: I have given two instances.

THE COURT: If he said what he wanted him for, (258) so we'd have something. I am not sure, I think you will agree that is a proposition that is not

*Colloquy*

very thoroughly briefed in the Pennsylvania decisions, is what you have got to do in order to bring yourself within that provision of the law. The court just lays down the rule an unforeseen contingency or emergency which necessitates the engaging of a helper in order to protect the master's interests.

MR. KNOX: You can understand for instance suppose the thing is wrecked, you have got a valuable load laying around a field in a storm, something like that, certainly a servant would have authority to engage a helper to help him protect, cover up with a tarpaulin.

THE COURT: I think that is right of a valuable, say a cargo of strawberries, something like that.

MR. KNOX: Here is a man having trouble with brakes at Buffalo; he got as far as Waterford, he is still having trouble. Night is coming on, it is in March, he still has the best part of a hundred miles, 75 miles to go, hilly country. I think he foresees that he is going to have a breakdown on the road, he wants somebody along to accompany him in that thing that appears certain in the light of what's been going on in the past.

THE COURT: If I submit this case to the jury on the question of negligence it ought to be separated under interrogatories whether they find ordinary negligence or (259) just common negligence.

MR. KNOX: I think your Honor can handle that with special interrogatories.

THE COURT: I am very doubtful you have made out a case on ordinary negligence, because I am afraid

### *Colloquy*

under all the facts here that you show this man—in other words, you don't show authority on behalf of the company to the driver. After all, you are suing the company, not the driver. I think though, my present opinion is you are entitled to go to the jury on the facts of the case, on the issue of whether or not it is due to the braking situation, the type of load, so on, whether it does amount to wanton misconduct to put this vehicle out on the road with the brakes in that shape.

MR. KNOX: I think it is an inference. Let's take the wreck situation where I say valuable cargo is strewn around the field, he runs up to the first house, he says to the farmer, "I just had a wreck, come out and help me, I will give you \$50." The farmer runs out, he doesn't say—

THE COURT: I think that is a clear case; I think that is the type of thing they are talking about.

MR. KNOX: I think the jury can infer what he wants the farmer to do is go out and help with the cargo. I think in this case the jury can infer he wants help (260) in case of a breakdown.

MR. WEBER: He didn't even say he wanted help.

MR. GORNALL: Yes, there is—

MR. WEBER: No.

MR. KNOX: Mr. Brown testified—

THE COURT: As I read these decisions—I read the ones you fellows cited—the courts don't say mere

*Colloquy*

engaging a man in an emergency when they don't define, don't particularize the duty; they say he should, in the Pittsburgh Brewing case, what was he to do, that wasn't enough.

MR. KNOX: Each case says it was for the convenience of the servant, not the master.

THE COURT: It occurred to me while the testimony was going on, one thing that would have met the requirement would have been if he had said, "Well in case of a breakdown I want somebody to help me put out a flare", something of that kind.

MR. KNOX: We can't put words in witness' mouths.

THE COURT: "I am liable to run off the road or in the ditch", so many things might have occurred, yet in your own case the difficulty of that feature is that he knew how to telephone, he telephoned before he just said right there.

MR. KNOX: We will say to that, your Honor, (261) there is evidence he said he made three calls in Waterford. We didn't put that in because we felt it would be improper, it would be getting into hearsay.

MR. GORNALL: He did put in one phone call, he asked Mr. Roberts—

THE COURT: I mean in meditating on the proposition that he was confronted with, an emergency, he doesn't know how to reach his employer, the fact that he knew where they were, and all about it, in this day and age. He says "My brakes are so bad".

MR. KNOX: He already complained at Buffalo and was told to go ahead.

THE COURT: He drove a hundred miles after that, ninety miles.

The motion for involuntary dismissal will be refused. I want you to present your instructions along that line. I doubt very much now—I better leave it to the jury—I doubt very much you are entitled to go to the jury on any phase of the case except the phase of trespasser, the way it looks right now. On the other hand, we may submit an interrogatory, instruct on both issues, see what they say about it, whether there is any evidence of wilful misconduct. Submit your points, prepare them on that feature of the case to the court.

Bring the jury back, gentlemen.

(262) You say you don't understand the court's ruling?

MR. COOPE: I am looking at this case Randall against Stager.

THE COURT: Which case?

MR. WEBER: That was cited in our brief.

MR. COOPE: Here is the note right here.

MR. WEBER: Randall against Stager, your Honor, was 355 Pa. 352. This was an action for personal injuries by a passenger against defendant driver under the Ohio guest passenger statute, which imposes a standard of care similar to that which we are discussing here. The owner is responsible only for wan-



*Daniel Fidler—Direct*

ton and wilful misconduct. The court says, "The evidence merely shows an unexplained accident, which could have occurred in any number of ways. We are mindful of the fact that in certain unexplained accident cases a jury may infer negligence on the part of the defendant from the surrounding circumstances. There is a difference of kind, not merely degree, however, between wanton misconduct and negligence." . . . "Before a jury may infer that a defendant was 'conscious', from his knowledge of surrounding circumstances and existing conditions, that his conduct would in all probability result in injury, there must be evidence from which the jury can deduce what caused the accident. Then and only then, is a jury justified in considering whether a defendant is (263) guilty of wanton misconduct.

THE COURT: All right.

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DANIEL FIDLER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct Examination*

BY MR. WEBER:

Q. Will you give us your full name and address, please?

A. Daniel Fidler, R. D. 1, Paxinos.

Q. What state?

A. Pennsylvania.

Q. And where, in the vicinity of what larger city is Paxinos?

A. Six mile outside of Shamokin.



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Q. And you are the owner of the tractor and trailer which was involved in the accident which has been the subject of this trial, is that correct?

(264) A. Yes, sir.

Q. How long have you been in the trucking business either as a driver or as an owner?

A. 1939.

Q. How long had you owned the particular rig, truck and trailer which was involved in this accident?

A. Since 1950.

Q. Since 1950, and from whom did you purchase it?

A. From Mr. John Gonboro at Weigh Scale.

Q. Now, did you engage Mr. Schroyer as a driver for this equipment?

A. Yes, sir, I did.

Q. When was he first hired?

A. On the 27th day of February.

Q. And before engaging him did you have an investigation and have references, require references for his work?

A. Well, he was recommended to me by the Firestone people in Shamokin.

Q. Now, were you required to have him approved and passed upon by the Aetna Freight Lines before he could drive?

A. Yes, sir, I did.

Q. And was it necessary for him to go to their headquarters and take an examination?

A. Yes, sir.

(265) Q. Do you know about when he started to drive for you?

A. Well I think it was, it was either the 27th or 28th of February.

*Daniel Fidler—Direct*

Q. And can you tell us whether or not this truck and trailer had any repairs or maintenance at any time before he started to work for the—

A. It was in the garage for one week.

Q. About what date?

A. Why, I think it was the 22d or 23d of February and was in for one week.

Q. Was that in for a week because of the necessity for any general overall?

A. Well, I thought it needed valves and pistons and that, and I had taken it over and they had done all that work.

Q. Can you tell us whether or not you had it in any garage for any brake work of any kind at any time before this accident?

A. Yes, sir, Mr. Schroyer had taken it in to the General Garage on March the 10th on a Saturday.

Q. Where is that garage located?

A. In Shamokin, Pa.

Q. Is that the place where you customarily have work done?

(266) A. Yes, sir.

Q. Now, were you aware of the fact that Mr. Schroyer picked up a load from the Crucible Steel Company, Syracuse plant, around March 13?

A. Not until he called me on Thursday.

Q. Thursday, that would be March 15?

A. The following Thursday.

Q. The 15th, yes. What was the nature of the call that you received on March 15?

A. On March 15, why, he told me he lost two tires.

Q. And from where was that call?

A. At Batavia, New York.

Q. And in response to that call did you go up to Batavia to see him, or bring him anything?

A. Yes, sir, I taken two tires and a wheel up.

Q. Now when you say lost tires, is this something that happens during the operation?

A. Well, sometimes. When I got up there on Friday he told me that he had a flat tire in Syracuse and he had to change this by a garage and they didn't tighten the lugs up tight enough.

Q. Now when you got there, did you learn what time he left Syracuse?

A. Well, only on Friday when I talked to him he told me he left Syracuse Wednesday night on account of a (267) flood.

Q. Did you check around, or did you have any opportunity to learn whether or not there was anything that handicapped the movement of traffic from Syracuse on the 13th or 14th of March 1956?

A. Only the flood. He told me that the police wouldn't leave them out or in.

Q. Did you learn that from other people besides Mr. Schroyer?

A. Yes, sir, I inquired from a couple truckers.

Q. At that time when you saw him on Friday—

A. Friday morning.

Q. The 16th—

A. Friday morning at seven o'clock.

Q. At that time did Mr. Schroyer tell you of any other kind of mechanical difficulty that he was having with the truck?

A. No, he hadn't.

Q. Did you inquire or check for any mechanical difficulties?

*Daniel Fidler—Direct*

A. I asked him about it, and I asked him how everything was, he says "Fine".

MR. GORNALL: I object to this, your Honor. It is hearsay.

THE COURT: Well now, wait a minute. You people (268) contended here that they had notice, should have had notice that he had defective brakes.

MR. GORNALL: I don't think we have claimed, your Honor, that Mr. Fidler had notice.

THE COURT: You claimed that the defendant did. This fellow is responsible if he knew that was a fact, why the defendant is responsible under the cases. Go ahead. Objection overruled.

Q. Did Mr. Schroyer complain of any kind of mechanical trouble on Friday the 16th?

A. No mechanical trouble, only the tire trouble.

Q. Now, did you have any standing instructions that you gave Mr. Schroyer with regard to carrying passengers?

A. Yes, sir, I gave him instructions.

Q. What were those instructions?

A. No hitchhikers.

Q. Is there anything else in or around the vehicle that would call anyone's attention to that?

A. Yes, sir, on the windshield.

Q. What is on the windshield?

A. Well there was a "No rider" sign on the windshield posted right on the right-hand side.

Q. Now in leaving Batavia, New York, was there any kind of weather condition that in any way affected driving or travel on the highway?



(269) A. Well, yes. At seven o'clock when I got there in the morning it was snowing, and it snowed till noon, there was about eight inches of snow. I gave him instructions not to move the vehicle as long as it was snowing, if it got worse to leave it set and go to bed. Those was his instructions.

Q. Now when did you hear from Mr. Schroyer again in the course of this trip?

A. The following Monday.

Q. And what was the nature of that call?

A. Well, he told me he couldn't get the truck started. I asked him where he was, he says in front of the Corning Hotel.

Q. In what town?

A. In Buffalo, so I knew where the Mack garage was from there, it was only about two blocks, so I told him to go to Mack garage, get somebody up to look at it and fix it, which he had done.

Q. Do you know if that was worked on at the Mack garage in Buffalo?

A. Yes, sir, it was worked on at the Mack garage, because I got a bill here for it.

Q. Can you tell us what work was done at the Mack garage in Buffalo?

A. Check ignition and starter, check battery. That's (270) what the bill was for.

Q. Do you know whether or not any other work except ignition or battery work was done in Buffalo?

A. No, sir, nothing else, that's all.

Q. Do you know the date when that truck was released from the Mack garage in Buffalo?

A. On the 19th. The third month, the 19th day 1956.

*Daniel Fidler—Cross*

Q. Was that the date on which it was taken in, or the date on which it came out?

A. The date the bill was paid, I guess.

THE COURT: The date the work was done, what is it?

THE WITNESS: That's right, the third, the 19th—the third month, the 19th day 1956, it was taken in; the third month the 20th, 1956, it was paid, by the driver.

Q. Now, did you hear from the driver any further after he called about that ignition work with regard to the condition of the car?

A. No, sir, I did not.

Q. What was the next news you had of this vehicle?

A. Mr. Roberts called me and told me the driver had an accident.

Q. At any time did you learn through Mr. Schroyer or anyone else that there was any complaint or any discussion of brakes?

A. He never said a word to me about brakes.

MR. WEBER: That is all, Mr. Fidler.

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*Cross-Examination*

BY MR. GORNALL:

Q. When did you receive this invoice from the Mack Motor—

THE COURT: If you are going to talk about that you better have it marked; if you are going to talk about an invoice it better be marked.

MR. WEBER: We hadn't intended to put it in as an exhibit.

**THE COURT:** He's talking about it.

**MR. GORNALL:** I don't want it in as an exhibit.

**THE COURT:** The court wants it. We don't know where this case is going to be. Somebody have it marked so we can have it. Don't talk about things that are not in evidence.

(Whereupon invoice, Mack Motor Truck Corporation was marked Defendant's Exhibit C for identification.)

**MR. WEBER:** I show you a paper that has been marked as Defendant's Exhibit C, labeled Mack Motor Truck Corporation, Buffalo 3, New York, ask you what that is?

**THE WITNESS:** The Mack Motor Truck Corporation.

**MR. WEBER:** In general, what is this paper?

(272) **THE WITNESS:** That is a bill.

**THE COURT:** That is a receipted bill that you discussed?

**THE WITNESS:** For the work he had done.

**MR. WEBER:** That is the receipted bill for the work done to the truck in Buffalo?

**THE WITNESS:** Yes.

**BY MR. GORNALL:**

Q. Mr. Fidler, when exactly did you receive this bill?

A. When I received that bill?

Q. This exact paper?

A. That, I found that paper right at the scene of the accident, when I was up Thursday following the accident.

*Daniel Fidler—Cross*

Q. You found this paper?

A. That's right, right at the scene of the accident.

THE COURT: In the vehicle, or on the ground?

THE WITNESS: On the ground.

THE COURT: On the ground?

THE WITNESS: Yes, sir.

Q. For all you know, you don't know whether they checked the brakes or not there, do you?

A. Well, there is nothing on there about the brakes.

Q. You don't know whether they checked the brakes or not?

(273) A. No, I do not.

Q. You don't know whether or not there was a complaint made to the Mack Motor Truck Company about the brakes?

A. No, sir, only about what he said he couldn't get the truck started.

Q. You don't know whether there was any complaint made there?

A. No, I do not.

Q. When was the last time that the trailer brakes were relined?

A. On March the 10th.

Q. March the 10th?

A. Relined?

Q. Yes.

A. In the last inspection, they wasn't relined in the last inspection—

Q. My question is, when was the last time, if you know, that the trailer brakes were relined?

A. In 1955 I think it was.

Q. You think it was 1955?

A. Yes, sir.

Q. Do you know the month?

A. I believe it was in December.

Q. You think it was December?

(274) A. I think '55.

Q. Why didn't you say December then the first time, instead of 1955?

THE COURT: Don't argue. He said that—

THE WITNESS: Well, I just don't know the exact time that they are supposed—

THE COURT: Just a minute.

MR. GORNALL: I withdraw it; I'm sorry, your Honor.

Q. How many miles did this piece of equipment travel, if you know, during January and February?

A. Between January and February?

Q. During January and February, if you know?

A. We generally figured about 800 miles a week.

Q. So we will figure eight and a half—

A. About 3200 mile in a month, something like that.

Q. 2800?

A. Three thousand.

Q. How many miles would that be he traveled during January and February?

A. Why, it is around, around 3000 a month.

Q. So that it would be 6000 miles?

A. That's right.

Q. And you think the brakes were relined in December of 1955?

(275) A. Yes, sir.



*Daniel Fidler—Cross*

Q. You have owned this piece of equipment six years, seven years?

A. Yes, sir, since 1950 I bought it new.

Q. How many times have you relined the brakes on this piece of equipment, the trailer brakes?

A. I think it was twice they were relined.

Q. You have relined them twice?

A. I think so.

Q. Did you buy the Gramm trailer new?

A. No, sir.

Q. How old was it when you bought it?

A. Well, I think I bought it in '52 off the Aetna Freight Lines; it was a 1949.

Q. And since you bought it in '52 you think you have relined the brakes twice, one time probably December 1955?

A. One time on the trailer and once on the tractor.

Q. So how many times have you relined the trailer brakes then?

A. Why, once.

Q. Just once?

A. That's right.

Q. And that would be in December of '55?

A. I think it was in '55, December.

(276) Q. And you never had the trailer brakes relined from the time you bought the piece of equipment until December of '55?

A. That's right, I think.

Q. And were these trailer brakes satisfactory during the period 1952 to December 1955?

A. Yes, sir. It had wonderful brakes, I have driven it myself.

*Daniel Fidler—Redirect*

Q. And then you had the brakes relined you think in December of '55?

A. Yes, sir.

Q. Shouldn't your brakes have been wonderful then for two and a half months after that?

A. They should have been.

MR. GORNALL: That is all.

MR. WEBER: One further question.

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*Redirect Examination*

BY MR. WEBER:

Q. I understand you bought this Gramm trailer from Aetna Freight Lines direct, is that correct?

A. That's right, sir.

Q. One other point. Have you ever in the time that you have owned a truck, had occasion to have just one of the brakes relined?

MR. GORNALL: I object to this, your Honor.

(277) A. Yes, sir.

MR. GORNALL: That is a leading question.

MR. WEBER: I didn't know whether it was going to be yes or no.

THE COURT: What was the question?

(Question read.)

MR. GORNALL: He's testified, your Honor, about the relining of the brakes. I think he's trying to lead him now.

THE COURT: One distinct from another wheel?

MR. WEBER: Yes. We had testimony this morning, your Honor, that for the most part they all wear

*Daniel Fidler—Redirect*

together, there are exceptional cases as Mr. Mayr testified in which it is, so I am asking Mr. Fidler if that is so.

**THE COURT:** Ask him whether it is so, whether or not he—

**MR. WEBER:** He said yes.

That is all.

**BY THE COURT:**

**Q.** Your statement was, I understood, Mr. Fidler, that you told your driver not to take any hitchhikers, is that it?

**A.** That's right, sir.

**Q.** And the sign on the cab said "No riders"?

**A.** Yes, sir, on the windshield, on the right-hand (278) side, down in the corner.

**Q.** You did authorize, you had authorized him as I understand it, to stop in a garage and make repairs from time to time?

**A.** Yes, sir, anything that was wrong with the truck, I authorized him to go and get it fixed.

**Q.** Without calling you up?

**A.** He didn't have to call me, but he did.

**Q.** He might have engaged a service of some kind without calling you, is that right?

**A.** Yes, sir.

**THE COURT:** All right.

**BY MR. WEBER:**

**Q.** Mr. Fidler, did Mr. Schroyer, was he in possession of money during the trip in order to pay for any repair bills he might need?

**A.** Yes, sir, he always had money.

*Adelbert Rice—Direct*

**THE COURT:** Okay.

(Witness excused.)

**MR. WEBER:** If your Honor please, might we have the stenographer read the questions and answers which the court posed to this witness?

**THE COURT:** What for?

**MR. WEBER:** I didn't hear them. There was a difference of opinion between—

(279) **THE COURT:** What are you going to do about it?

**MR. WEBER:** Was he asked whether or not he had authority to engage services or servants?

**THE COURT:** Services.

Go ahead, call your witness.

**MR. WEBER:** Mr. Bert Rice.

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**ADELBERT RICE,** called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct Examination*

**BY MR. WEBER:**

**Q.** You are Mr. Bert Rice, the terminal manager in Buffalo, you have testified earlier?

**A.** Yes, sir.

**Q.** Mr. Rice, at any of the times that you—cross that, start this way please. Mr. Rice, from your testimony this morning I believe it may be inferred that you believed that Mr. Schroyer left Syracuse on March 13, the date of the invoice. Do you have any way of knowing what date Mr. Schroyer left Syracuse with his load from Crucible Steel?

*Adelbert Rice—Direct*

A. No, sir, that was the date he was to pick the load up was that day.

Q. Are you given any information from any documents or anything else to show the date the load was actually (280) picked up or the date the driver left any particular town?

A. No, sir.

Q. Then your knowledge of the 13th is the the date on which the order to pick up a load was given, is that correct?

A. That's right, sir.

Q. Now going to the 15th when you received the call from Mr. Schroyer about the trouble with his rig in Batavia, can you tell us what the complaint was?

A. He had lost a tire, had tire trouble.

Q. Did he mention anything else about the operation of the truck or complain in any way about its mechanical condition?

A. No, sir, he did not.

Q. Now am I correct the next time you saw him was Monday the 19th?

A. Monday morning, yes, sir.

Q. And that was in Buffalo at the terminal?

A. At the terminal, Buffalo, yes.

Q. And did he discuss what difficulty he was having with the truck at that time?

A. Yes, he couldn't get it started.

Q. Did he mention any other kind of mechanical difficulty that he was then having or had been having during this trip with the truck?

A. No, sir.

(281) Q. Do you know whether or not as a result of



*Adelbert Rice—Direct*

checking with Mr. Fidler that truck was taken to any garage?

A. Yes, sir, it was taken to the Mack garage.

Q. Now I believe that you saw Mr. Fidler again on Tuesday, Tuesday morning the 20th, is that correct—or Mr. Schroyer?

A. Sometime during the morning of the 20th, I wouldn't say what time, I don't know.

Q. Can you tell us whether Mr. Schroyer was present and satisfied with the trial run that you made with the brakes on the trailer?

MR. GORNALL: I object to that question, your Honor, Mr. Schroyer was present and satisfied.

THE COURT: Well now—

MR. WEBER: If a complaint has been made—

THE COURT: Your theory of the case would indicate that he wasn't satisfied, so I think you are entitled to ask that question.

Objection overruled.

A. Yes, sir, he was.

Q. Did he participate in making that examination with you?

A. Yes, sir.

Q. Mr. Rice, did you ever drive a truck?

A. Yes, sir.

(282) Q. And do you have any motor maintenance experience?

A. Yes, sir, I have.

Q. What does your motor maintenance experience consist of?

A. In the Army in the war, motor sergeant.

*Adelbert Rice—Direct*

Q. Did you have any particular training for that particular job?

A. Yes, I went to G.M.C. Tech, Flint, Michigan.

Q. How long a course is that?

A. Five-week course.

Q. Did your duties as a motor sergeant consist in care and maintenance of heavy equipment?

A. Yes, sir, all heavy equipment.

THE COURT: How many trucks did you have?

THE WITNESS: Oh, roughly ranged from maybe ten to thirty-five, where we were stationed.

Q. Is that a normal and standard method of testing the brakes that you went through at that time?

A. It is for the complaint that he had, yes, sir.

Q. And your test was designed to find out what element of possible trouble there was?

A. That's right. He said they weren't applying fast enough.

Q. Which ones was he referring to?

A. Trailer brakes.

(283) Q. Did you make a test specifically designed to test the trailer brakes?

A. Yes, sir.

Q. Were you satisfied with the result of the test?

A. Yes, sir, I was.

Q. Was Mr. Schroyer satisfied?

A. He was, sir.

Q. Did you at any time after Tuesday morning hear from Mr. Schroyer in any way concerning any complaint about the mechanical condition of this vehicle?

A. No, sir, I did not. That was the last I seen him.

*Adelbert Rice—Cross*

Q. Mr. Rice, was there any weather condition existing in or around Buffalo from the 16th or the 19th of March impeding traffic?

A. We had about ten inches of snow.

Q. Was the temperature unusual in any way?

A. Yes, sir, it was cold, very cold.

MR. WEBER: That is all.

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*Cross-Examination*

BY MR. GORNALL:

Q. Mr. Rice, how much trouble would it have been for you to take off the dust pan and check the trailer brakes there in Buffalo?

A. Quite a bit of trouble.

(284) Q. Especially because it was so cold?

A. No, sir. At my office I am dressed the way I am now. You have to crawl under the trailer in order to take those shields off.

Q. Wouldn't a better test of the trailer brakes have been to take off the dust pan and check the lining rather than just sit in the cab where it is nice and warm and try the trailer brake handle when the outfit is standing still?

A. He wasn't complaining about the brake not holding, but going on slowly. I was more interested in the arms working from the dust pan air chamber back and turning the cams.

Q. But you are a mechanic and you do know what you are doing when you check trailer brakes, and you take off the dust pan, you are familiar with that test?

A. Yes, sir.

Q. How did he complain about the trailer brakes?

A. He said they weren't applying quick enough.

Q. Did he say they didn't work too good?

A. Well too good, well I don't know just the exact word he used, but implying that they worked, but slowly. In other words, they didn't grab as quick as he thought they should, as though there was something holding them.

Q. Does the Aetna Freight Lines have any inspection (285) station in New York?

A. No, sir.

Q. Do you know if they have any inspection stations?

A. Yes, sir, we have a garage at Girard.

Q. Girard where?

A. Girard, Ohio.

Q. That is the main office?

A. It is near the main office.

Q. Where is Aetna's leased equipment checked and inspected?

A. Girard, Ohio.

MR. GORNALL: That is all.

BY THE COURT:

Q. Let me ask you,—he led you up to that point—was this equipment inspected at Girard, Ohio?

A. Yes, sir.

Q. When?

A. That I don't know sir. I have no records in my office of the date.

Q. How long had you leased this vehicle, this equipment, how long had it been under lease to you?

A. That I don't know, sir. I have been with the company four years, it's been leased to us ever since I was with the company.

Q. How often would you inspect those leased vehicles (286) at the Ohio garage?

*Rodhy Roberts—Direct*

A. That I don't know, sir. We inspect them at the terminals for lights and safety equipment and visual inspection for broken springs, cracked frames and things like that.

THE COURT: That is all.

BY MR. GORNALL:

Q. Aren't brakes part of the safety equipment?

A. Yes, sir.

MR. GORNALL: That is all.

MR. WEBER: Mr. Rice, did you conduct any inspection at Buffalo for lights and such things as you have mentioned?

THE WITNESS: Oh, yes, sir, before the truck left.

(Witness excused.)

MR. WEBER: Mr. Roberts.

THE COURT: The reporter didn't have any recess, she worked while the jury was upstairs. We will take 12 minutes at this time recess.

(Recess taken.)

MR. WEBER: Mr. Roberts, please.

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RODHY ROBERTS, called as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

(287) *Direct Examination*

BY MR. WEBER:

Q. Will you give your full name and address again.

A. Rodhy Roberts, 1272 Bell Street, Warren, Ohio.



*Rodhy Roberts—Direct*

Q. And you are safety and personnel manager for the defendant, Aetna Freight Lines, in this case?

A. Yes, sir, in this case.

Q. Mr. Roberts, before engaging any driver, or before allowing any lessor of equipment operating under your I.C.C. permit, do you conduct an examination of that applicant?

A. Yes, sir, that's right.

Q. Where are those conducted?

A. In the Warren, Ohio, office.

Q. Do you have a personal recollection of conducting the examination of Charles Lester Schroyer, who was involved in this case as a driver?

A. Yes, sir, I do.

Q. Do you recall the approximate date on which he was examined by you?

A. I believe that was February 28, 1956.

Q. What type of questions are directed to the applicants in this examination?

A. We acquaint the applicant with all rules and regulations pertaining to the equipment operating in interstate (288) state commerce. By virtue of the fact that we have a certificate under the Public Utilities Commission of Ohio, we acquaint drivers with those various regulations, we give the driver a regular test, we also give a Scott test, which is similar, which is very similar to the Army entrance examination they gave in the army, to ascertain the man's mentality, and with these series of tests we also give him instructions relating to the handling of his bills and what is required of him as a driver for the Aetna Freight Lines, Incorporated.

Q. On the questionnaire, is there any question to test

*Rodhy Roberts—Direct*

his knowledge of the rules with regard to carrying passengers?

A. Yes, sir, there is. I believe that question reads "When is it permissible to carry a passenger in your tractor."

Q. Do you recollect the answer which Charles Lester Schroyer gave to that question?

A. I believe his answer was "No time".

MR. WEBER: With the court's permission, it was not authorized at pretrial, at this time we'd like to mark and offer as an exhibit the questionnaire answered by Mr. Schroyer on this examination.

THE COURT: Well now, let's see.

BY THE COURT:

(289) Q. Mr. Roberts, do I understand that Aetna lays down the rules about whether or not a driver can carry a passenger, or whether the owner of the truck, Mr. Fidler, lays down the rules?

A. No, sir. That is an Interstate Commerce Commission regulation. We are in performance of the familiarization of this man with the Interstate Commerce Commission rules related to him in question form by means of the question, "When is it permissible to carry a passenger in your tractor?" The answer of course is never, and that is the rule as laid down.

Q. That is the answer you want him to give?

A. That is the answer that is required, and that is the answer that he should be familiar with.

Q. The regulation itself prohibits passengers?

A. Yes, sir.

Q. Is that it?

A. Yes, sir. Yes, sir.

*Rodhy Roberts—Direct  
Offer—Defendant's Exhibit D*

(Whereupon a questionnaire was marked Defendant's Exhibit D for identification.)

THE COURT: Any objection to that, gentlemen?

MR. GORNALL: Just a minute, your Honor.

We have no objection.

THE COURT: All right, admitted.

(290) BY MR. WEBER:

Q. I show you a paper which has been marked as Defendant's Exhibit D, and is labeled "Questionnaire on I.C.C. Regulations", the paper being a photocopy, and ask you if you can identify and tell what that paper is?

A. Yes, sir, this is the questionnaire on company regulations and I.C.C. regulations which was given to Mr. Schroyer by myself on the 28th day of February 1956.

Q. Was that signed by Mr. Schroyer in your presence?

A. Yes, sir.

Q. And with reference to Question Number 13, that question was put to him, "When is it permissible to carry a passenger in your tractor?"

A. Yes, sir.

Q. And the written answer is "No time", that is his answer?

A. That is his answer.

MR. WEBER: We offer Exhibit D.

Q. Now Mr. Roberts, with relation to Mr. Schroyer and the operation of this truck, can you tell us how many calls were received by Aetna Freight Lines that came to your attention from Mr. Schroyer, or on behalf of Mr. Schroyer, during the period from his departure from Syracuse, New York, to the date of this accident?

A. I believe I received one call in regards to tire (291) trouble, if I remember correctly.

Q. Did you receive any other calls of any kind during the period, from Mr. Schroyer or anyone on his behalf or anyone in your terminal, complaining of any other kind of mechanical trouble except that one on the tire trouble you have mentioned?

A. No, sir.

Q. Are you the chief person in the safety and personnel division?

A. Yes, sir, I was.

Q. Normally, do such calls that are referred to the main office in Warren, Ohio, come to you for your attention?

A. The majority of them do, yes, sir.

Q. Did any other report of any kind during that period come to your attention of any kind of trouble with this vehicle?

A. No, sir.

Q. When were you first notified of the accident?

A. I received a call from the state police, it was either the early morning of the 21st, or close to midnight of the 20th of March.

Q. Where were you when you received that call?

A. I believe I was at home.

Q. In Warren, Ohio?

(292) A. Yes, sir.

Q. And what did you do in response to that call?

A. I went to the scene of the accident.

Q. Were the vehicles still in place at the scene of the accident when you arrived?

A. Yes, sir.

*Rodhy Roberts—Direct*

Q. Were you in the company of any parties when you arrived at the scene of the accident?

A. Yes, sir, I was in the company of the state police officers.

Q. When you say state police officers, do you mean the ones that testified here yesterday?

A. Yes, sir, the two gentlemen that testified yesterday.

Q. Did they point out the situation of the vehicles to you as being the situation in which they were found?

A. Yes, they directed me to the scene of the accident, and it was evident that the vehicles were that that was leased to Aetna Freight Lines.

Q. Mr. Roberts, did you observe the situation of the highway at the point where these broken guard rails are and the broken telephone pole, with regard to visibility forward and behind at that point?

A. Yes. At the point where the vehicle left the road, I would approximate to the top of the hill, that the— (293) that would be looking east, northeast, he would have, the driver would have approximately to the rear about 300 feet visibility.

Q. Was there any curve or bend in the road that obscured his visibility to the rear, or the east?

A. Yes, his visibility would be obscured in the curve, but as you approached into the curve you would a more or less of a straight continuous road for approximately 300 feet before you went into the curve.

Q. Do you mean you would have straight visibility for 300 feet—

A. No.

Q. —before the point where the vehicle went off the road?



A. That from the top of the hill to the point where he went off the road, it would be approximately 300 feet.

Q. With regard to looking toward the west, or the direction in which we presume the vehicle was going, can you tell us the situation of the road with respect to being straight or curved or visibility ahead?

A. Yes. Once you got around the curve, then you would have approximately a quarter or a half a mile of visibility down the incline of the hill, and from that point on a clear day you could see almost to the Pennsylvania Turnpike overpass.

(294) Q. Now you say from a point where you got around the curve. Is that point further on than the scene, of this scene?

A. Yes, it would be.

Q. Right at the scene of this accident, can you tell for how far ahead you have an unobscured vision of the road?

A. You won't have too much, because you are, you have a curve going to your left.

Q. Now, how far down below the level of the road did you find this wrecked vehicle, the tractor and trailer?

A. Well, I'd approximate it to be about 35 feet.

Q. Is that a fairly steep drop off the road, do you know?

A. Yes, sir, it is.

Q. Did you do any checking of the vehicles as they lay down in the portion down below the highway there?

A. No. I did observe, I checked the tractor and trailer, I noticed that the trailer was still coupled to the tractor at the fifth wheel, and I noted that all the air hoses were intact, that the tires were apparently in good condition.

*Roddy Roberts—Direct*

Q. Did you specifically look at the tires for anything in the nature of brush burns or scraping along the road?

(295) A. There was no indication on the tires.

Q. But did you specifically look at the tires for that?

A. Yes, sir.

Q. Now, did you make the arrangements to get this wrecked vehicle out of that location there?

A. Yes, sir, I contacted the Rosenberg Garage.

Q. Can you tell us what had to be done to get the tractor and the trailer out from that location and back up to the highway?

A. Yes, sir. The trailer was laying on the bed of the trailer; the tractor was laying on its side up against a tree, and they had to first uncouple, or release the tractor from the trailer, which was done, and the trailer—the tractor, was drug up over the embankment on to the road, where a wrecker picked it up by its front end and towed it into Beaver Falls, Pennsylvania, the Rosenberg Garage. Then the trailer posed somewhat of a problem, in-as much as it was on its bed.

THE COURT: You mean it was upside down?

Q. You mean when it is on its bed, it is upside down?

A. Yes, sir. A cable had to be placed around the trailer and winched back on to its wheels, which in the process, the trailer was drug upwardly, up the embankment.

(296) Once the wheels made contact with the ground, a cable,—the cable was holding the trailer—a second cable was sent down and winched on the front of the trailer and by the use of the cable on the front of the trailer, the trailer was winched sideways and the front of the trailer was winched up over the embankment on to the road.

*Roddy Roberts—Direct*

Upon getting the trailer up on the road, a Rosenberg wrecker lifted the front of the trailer and towed the trailer into his garage.

Q. Then both vehicles, but the trailer particularly, experienced considerable dragging over the ground and up the side of the hill to get on the road, did they not?

A. Yes, sir.

Q. And how far in from the scene of this accident is Rosenberg's garage?

A. Oh, I would approximate it to be about 15 mile I will say, 12 to 15 mile to Beaver Falls, on the other side of Rochester, I imagine about 15 mile.

Q. Now when they were in the garage, can you tell us whether they were found to be repairable in the state in which they were?

A. That is both the tractor and the trailer you are referring to.

Q. Yes, will you answer with regard to both.

A. Well, I don't know of my own personal knowledge (297) whether they'd be repairable or not. I understand later that they were junked, but at the time I didn't know whether they'd be repairable or not.

Q. The question of whether or not to repair or junk, is that a concern of Aetna Freight Lines?

A. Well, no, sir.

THE COURT: It is not the concern of this court either.

MR. WEBER: Withdraw the question.

Q. Do you know whether or not it was repaired or junked?

A. I don't know personally. I understand it was

junked though. From my own personal knowledge I do not know.

Q. We heard the testimony about an I.C.C. inspection of the wrecked vehicle. Can you tell us whether or not that is a normal business routine in an accident of this type?

A. Yes, sir, it is.

Q. Do you know what the I.C.C. procedure is for such inspections?

A. Yes, sir. Whenever an accident occurs on the state highways where the Interstate Commerce Commission would have jurisdiction, otherwise the load would be traversing in interstate commerce, they have somewhat of a (298) working agreement with the state police whereas they are notified if it comes to the police attention of this accident, and they in turn come out and make their own investigation on the accident.

Q. Were you present at Rosenberg's garage when the inspection was made by the I.C.C. men and the mechanics Bushless and Novak, whose testimony has been read here?

A. Yes, sir, I was.

Q. Can you tell—did you observe and hear Mr. Bushless, the mechanic and the I.C.C. man as they went over the tractor and the trailer?

A. Yes, sir.

Q. And can you explain whether or not the tractor and trailer were in the same place in Rosenberg's garage?

A. No, sir, the tractor was inside the garage, the trailer was in a lot adjacent to the garage.

Q. And did Bushless, whose testimony has been read, participate in both the tractor and the trailer?

*Rodhy Roberts—Direct*

A. Did Bushless—what was that, sir?

Q. Did he participate in the inspection of both the tractor and trailer?

A. Bushless, yes, sir.

Q. If you recall the testimony of Mr. Bushless that has been read, the question, "In other words then you check the brakes, diaphragm or pancakes on all of the wheels?" (299) and Mr. Bushless answered, "No", and then the question, "Just the front wheels?" and the answer "No, just what I told you, one front and one rear."

To the best of your recollection of that, is that correct?

A. No, it isn't.

Q. Can you tell if every wheel on this vehicle was inspected in your presence and in your hearing?

A. It was.

Q. Did you hear the comment of the right rear tandem wheel having little or no lining as testified to here today?

A. Yes, sir.

Q. And the left front tandem trailer wheel having a small amount of lining, is that correct?

A. Yes, sir.

Q. Was there any comment about the amount of lining or lack of lining on any other wheel of the tractor or trailer by any of the parties that participated in that inspection?

MR. GORNALL: I object to this, Your Honor. Hearsay.

THE COURT: Well now, you brought it out by the man. I assume the question means any comment



*Rodhy Roberts—Direct*

by Bushless at the time he made the inspection, whether he said anything (300) to anybody. He's testified what the fact was, and now he's interrogating whether he made any statement about it at the time he made the inspection.

MR. KNOX: I understood he was asking about other people's comments. If he is limiting it to Bushless—

THE COURT: Make it Bushless, did he say anything about it.

THE WITNESS: Yes, sir, Mr. Bushless and Mr. Loucks.

THE COURT: Well, we don't have any testimony of Loucks, do we?

MR. KNOX: No.

THE COURT: Go ahead.

Q. Was there any comment of insufficient brakes from Mr. Bushless on any other wheel, on either tractor or trailer?

A. No, sir, there wasn't.

THE COURT: How is that meant, any other wheel? Any wheel at all?

MR. WEBER: Of these vehicles.

THE COURT: You had him talking about the right and front. I am not certain whether you brought from the witness whether Bushless made any comment about any one of those.

MR. WEBER: Yes, I believe—

*Roddy Roberts—Direct*

(301) BY THE COURT:

Q. Did he make any comment about any one of the wheels at all?

A. He referred to the other wheels other than the two that were mentioned as one not having too much brake lining.

Q. Bushless said one didn't have too much, one of the wheels had insufficient lining?

A. That's right.

BY MR. WEBER:

Q. Did Bushless examine all of the wheels?

A. Yes, sir, he did.

Q. Did he point out any other wheel that didn't have sufficient lining in his opinion?

A. No, sir, he did not point out any.

Q. Did Bushless pull any of the wheels, that is, take off any of the wheels, to examine the brake drum?

A. Are you referring to the trailer?

Q. To which?

A. Are you referring to the trailer?

Q. Well, did he do it in reference to the trailer?

A. No, sir, he did not.

Q. Did he do it in reference to the tractor?

A. I think he pulled one of the wheels on the steering axle and I think they pulled the wheels on the (302) drive axle.

Q. That is of the tractor?

A. Yes, sir.

Q. The tractor; and can you tell what condition they found those in?

A. Well, the steering axle had new brake lining on it. The drive axle brake lining was very good.

*Rodhy Roberts—Direct*

Q. Now for my benefit and the court and jury, when you mention steering axle you mean the very front two wheels of the tractor, is that correct?

A. Yes, sir.

Q. And the drive axle is the rear two wheels of the tractor (referring to board) each of which contains two tires on each side as shown here on the diagram?

A. Yes, sir.

Q. This is the steering axle?

A. Yes, sir.

Q. And that is the drive axle?

A. Yes, sir.

Q. And those wheels were pulled for visual examination of the drums?

A. Yes, sir.

Q. Were you present during the entire inspection of the trailer?

A. Yes, sir.

(303) Q. Was there any request from any party, or any suggestion that the wheels be pulled to examine the drums?

A. None whatsoever.

Q. Do you recall the testimony as to the cam on the right rear being frozen?

A. Yes, sir.

Q. Do you know whether or not there was any evidence of a burning, or fire in that wheel when it was examined?

A. No, sir, there was not.

BY THE COURT:

Q. How long a hill was that, or is it?

*Roddy Roberts—Cross*

A. Sir, that is a winding stretch of road. That takes various, what I would say would be dips, and then as you would reach it would be possibly at the top of the hill you start a gradual descent. It is not a steep hill, it is a gradual descent coming down, going around a curve and down, down to the bottom of the hill. It was an approximation, I would approximate from the top to the bottom would not exceed, oh, a quarter, a half mile, sir.

Q. Then how far down the hill was the point where the driver would take off?

A. It would be approximately 300 feet where he started to leave the road.

Q. From the top?

(304) A. Yes, sir.

THE COURT: I see. Anything further?

BY MR. WEBER:

Q. Was there any further I.C.C. inspection or inquiry about this condition of this vehicle after that date?

A. No, sir.

MR. WEBER: That is all, Mr. Roberts.

THE COURT: Cross-examine.

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*Cross-Examination*

BY MR. KNOX:

Q. Mr. Roberts, I show you Defendant's Exhibit D. Will you read these questions and answers, and state if the ones I am referring to are correct as Mr. Schroyer answered?

A. Which ones are you referring to?

Q. I am asking about the whole list first.

A. Do I think they are substantially correct?

*Rodhy Roberts—Cross*

Q. Yes.

A. Well, that apparently at the time was his opinion when he filled this thing out, and we in turn after it was filled out had gone over these particular questions and explained to him if he was wrong.

Q. Are there any answers that are wrong in there?

A. Oh yes, he's got one or two in here that is (305) wrong.

Q. Which ones?

A. Number 4, "Where should the third pot torch be placed."

Q. Yes. Any others wrong?

A. "What speed do you consider"—no, that—

Q. Let me ask you, is the first answer correct, if it stalls at night on the highway, the answer is about setting flares and so forth. That is correct, is it?

A. Well the first question, let me read it. "If your tractor should stall at night on the highway what is the first thing you should do after pulling as far off the highway as possible?" Mr. Schroyer answered he would block his wheels then set out his flares 300 feet on the rear, front and rear, and about the truck.

Q. All right. That is correct, isn't it?

A. I would say it would be, yes, sir.

Q. Let me ask you, Number 18 is correct—is that correct, "Is the company responsible for the condition of an operator's equipment?" Answer "Yes"; is that correct?

A. Yes.

Q. "Must they inspect it?" "At times".

A. No, that is wrong.



Q. Let me ask you, does your company have any maintenance men who take care of equipment?

(306) A. Yes, sir, we do.

Q. And how many do you have?

A. Mr. Trask and two assistants.

Q. Where are they located?

A. They are located in Girard, Ohio.

Q. Let me ask you, sir, are you a mechanic?

A. No, sir, I am not.

Q. You had no mechanical experience?

A. No, sir.

Q. So in so far as the mechanical work of your company is concerned, that is performed by Mr. Trask and these two assistants, is that correct?

A. Yes, sir.

Q. How many pieces of equipment does your company operate?

A. We lease approximately three hundred pieces of equipment.

Q. Eighty to a hundred?

A. Beg pardon?

Q. You say eighty to a hundred?

A. Approximately three hundred.

Q. Three hundred pieces?

A. Yes, sir.

Q. Did you take Mr. Trask or any of his assistants with you to this examination at Rosenberg's garage?

(307) A. No, sir, I had no knowledge of the request of the Interstate Commerce Commission till I was at the scene of the accident, at which time the state police informed me Mr. Loucks had called long distance from

*Rodhy Roberts—Cross*

Pittsburgh, told me not to leave, that they wanted to inspect the outfit and in my presence.

Q. When did that inspection take place at Rosenbergs?

A. Well, I would say that happened on the 22nd.

Q. That would be three days after the accident?

A. Yes, sir.

Q. Weren't you called by Mr. Goode or someone from the I.C.C. office at Pittsburgh and told they proposed to make this examination at that time?

A. No, sir, I was not called.

Q. How did you happen to be there at that time?

A. I was at the scene of the accident, sir.

Q. Yes, but this is three days after the time of the accident when this examination takes place.

THE COURT: Wait a minute. He said the 22nd.

Q. I beg your pardon. Two days, or the second day after the accident.

A. Yes, sir. I was there the 21st and the 22nd.

Q. You just happened to be there when this examination came along, is that correct?

(308) A. No, I was told to wait until they would come there. Mr. Loucks telephoned the state highway police and he informed them that he wanted to make an inspection, when he would be out, I should be there.

Q. When was that that you received that notice?

A. Oh, sometime I think the latter part of the day on the 21st.

Q. And that they were coming on the 22nd to make this examination?

A. Yes, sir.

Q. That gave you time to bring a mechanic of your own over from your headquarters, did it not?

A. I don't understand what you mean.

Q. You had time to bring Mr. Trask or one of his mechanics over from your headquarters at Warren, Ohio, to be present at that examination if you wanted to observe the mechanical condition, didn't you?

A. No. They said they would select a mechanic themselves, they weren't interested in Mr. Roy Trask's opinion.

Q. Weren't you interested?

A. Was I interested in Mr. Trask's opinion?

Q. Yes.

A. No, the other mechanic was supposedly competent.

Q. You weren't interested in having any mechanic (309) from your company inspect this equipment at all?

A. Not if there was another mechanic available that was competent.

Q. When had Mr. Trask or either of these mechanics inspected this equipment last before this accident?

A. That I don't know, sir.

Q. Do you have any knowledge that they ever did inspect it?

A. Not to my knowledge, no, sir.

Q. In other words, your company personnel, your maintenance man and the two mechanics who are in his department, to your knowledge never inspected this piece of equipment to determine whether it was in proper operating condition, did they?

A. I don't know. I do not have access to Mr. Trask's records.

*Rodhy Roberts—Redirect*

Q. You have no knowledge that they did, do you?

A. No, sir, I have no personal knowledge that they did, no, sir.

MR. KNOX: That is all.

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*Redirect Examination*

BY MR. WEBER:

Q. Mr. Roberts, can you tell us whether or not the Gramm trailers purchased by Aetna from the Gramm Company in 1949, were standard 1949 model Gramm trailers, or (310) whether they were custom made to certain specifications of Aetna?

A. They were custom-made.

Q. What are the principal differences between the Gramm '49 tractor and the Aetna models that were custom made?

A. Primarily the weight of the trailer. Our trailer weighed approximately 825—rather 7800 pounds.

Q. As opposed to what standard, do you know?

A. Where the average tandem 26-foot trailer would weigh in approximately—

MR. KNOX: I object to this. The man says he is not a mechanic.

MR. WEBER: You don't have to be—

THE WITNESS: Eight and nine thousand pounds.

THE COURT: Offer this as to weight anyway. Go ahead. Anything further.

Q. Is there any difference in the length of the vehicles?

A. Yes, sir, there is. It is a 26-foot trailer.

Q. The Aetna is 26, or the Gramm?

A. The Gramm. The Gramm, well the Gramm that we had was a 26-foot trailer, but the Gramm Trailer Company can make that 26, 30 or 32-foot trailer.

THE COURT: What has this got to do with it? What (311) is the probative value of this?

MR. WEBER: Mr. Mayr, the plaintiff's expert, said he was familiar with Gramm trailers, but admitted that he did not know there was a difference between Aetna's and the standard stock model.

THE COURT: He is just talking about the size. He was talking about the mechanics.

MR. WEBER: I asked him if he knew there was any difference in size or weight or mechanical—

THE COURT: Does the difference in size have anything to do with the operation of the cam, the brake drum, the brake?

MR. WEBER: It has something to do with his competence as an expert.

THE COURT: That might be true, but you have shown the difference.

MR. WEBER: All right, here is the difference. That is all, Mr. Roberts.

BY THE COURT:

Q. Aetna itself then in 1956 didn't own any trucks, they were all leased trucks?

A. Sir, we had two tractors.

Q. Just two?



*Requests for Instructions*

A. Two tractors, sir, and approximately seventy trailers.

(312) THE COURT: I see. All right.

(313) THE COURT: Here are some copies of what I propose to leave with the jury by a special verdict, interrogatories.

Now in the first place, we had a short meeting last evening and I just want to confirm for the record, gentlemen, that the plaintiffs have withdrawn the claim for relief under the survival act. Is that correct?

MR. GORNALL: No mention will be made to the jury.

THE COURT: That's right. We will argue the question of damages and liability, so on, based upon the pecuniary benefits to which the wife and the minor children are entitled.

MR. GORNALL: We so stipulate, your Honor.

THE COURT: That is agreeable, Mr. Weber?

MR. WEBER: I can see no objection to it at this point.

THE COURT: All right.

Plaintiff's Requests for Instructions, Number (1).  
What is the matter with Number (1), Mr. Weber?

(314) MR. WEBER: Nothing is the matter with the statement of law he would not be a trespasser, but he also would not be entitled to recover under this case.

*Requests for Instructions*

**THE COURT:** Of course that isn't his point in this.

**MR. WEBER:** If he was hired as an emergency employee in Aetna business, I think he is under Workmen's Compensation.

**THE COURT:** Well then, I will grant it, Number (1) will be read. That is approved.

Number (2) "Even if you should find that Schroyer had no implied authority to engage Ormsbee as an assistant or helper, that would not relieve the defendant, Aetna Freight Lines, Inc. from liability for Ormsbee's death, if the injuries causing the death resulted from wanton, wilful or reckless misconduct on the part of the defendant or its driver, Schroyer."

Well now, gentlemen, we looked at that last night, and those cases say wanton or wilful. I don't see anything wilful in this case.

**MR. KNOX:** No, but your Honor, I think in Slother against Jaffe, I think wanton means reckless.

**THE COURT:** That is true. I think you ought to strike out there—

**MR. KNOX:** "Wilful"?

(315) **THE COURT:** "Wilful", because that means intentional.

**MR. KNOX:** That is correct. I don't think you can find that in the case, no wanton nor reckless, because the court does say wanton is synonymous with reckless.

*Requests for Instructions*

THE COURT: All right. I will grant that request, but strike out "wilful" in Number (2).

Number (3), "A person's conduct is in reckless disregard"—well, that is a restatement of torts. I have got that written down, I am going to give that instruction in my charge. I don't know as I will read this. I won't read this because I will have it there before I get to read that.

Number (4); anything wrong with that?

MR. WEBER: (4), I'd say "presuming negligence on the part of the driver."

MR. KNOX: I think that is probably true. The "driver" would be a better word in there. I assume the court will instruct—

MR. WEBER: I don't think they can presume anything else than that the driver did not have his vehicle under control. It would not ordinarily happen if he did.

THE COURT: Change the word "defendant" to "driver". I don't know if "presuming negligence" is the right word. It says inferring negligence, negligence per (316) se.

MR. KNOX: I have no argument about the use of the word "infer".

THE COURT: I think it is probably the same thing. I am going to read that paragraph in Musmanno's opinion where he compares it with driving off the left side of the road. I think it is a good illustration, it is easy to explain. Those are the words of the high court.

*Requests for Instructions*

All right, gentlemen, I will read three of those. Number (3) is denied because I think I will have read that before I get to the requests.

MR. WEBER: Number (3) is asked for almost in identical terms in ours.

THE COURT: You will get the same treatment.

Number 1 for the defendant, that is binding instructions, so that is refused.

Number 2, I am going to refuse that. That is asking to find that a trespass exists.

MR. WEBER: I understood yesterday it was your Honor's opinion that he was a trespasser.

THE COURT: You understood correctly. I said that there was considerable evidence along that line. I am not deciding that yet. I will say this, I may have to when the case is over. I don't know, we may look at it again. We will see what happens then with these findings. (317) I was more of that mind until I heard this fellow—what was his name—the owner?

MR. GORNALL: Fidler.

THE COURT: When he testified, then I was afterward.

Number 3, if he was a trespasser, well, that is a correct statement of law, isn't it, gentlemen?

MR. KNOX: That's right, as long as it is taken in conjunction with the qualifications—

THE COURT: You don't make a bald statement, not anything more—

*Requests for Instructions*

MR. WEBER: It says "ordinary negligent acts."

THE COURT: This will be affirmed.

Well now, I think this is a correct statement of the law. Of course in this case I think it would be on the defense side you want to leave "wilful" in there, that is all right, but the application of that principle here would be wanton misconduct, because I don't see anything that says wilful.

MR. WEBER: The cases always run those two words together.

THE COURT: I will affirm that, if you want it that way.

In this point, I would say here that we strike out the word "wilful", then you have got a correct statement as applied to this case.

(318) MR. WEBER: We will strike out "wilful".

MR. KNOX: I don't know, negligent misconduct is never wanton. The same act might be both negligent and also wanton.

MR. MacKRELL: It can't be, by definition of the term.

THE COURT: One might include the other.

MR. KNOX: Sure, it could. Failure of a tire might be an ordinary act of negligence, it might also be wanton reckless misconduct.

THE COURT: I think that is right. That I think might be confusing. I don't think that is needed. I am going to define negligence, and try and point out to the jury what negligence is, of course, and all that



*Requests for Instructions*

is necessary there to find that negligence; now based on these interrogatories I have got, then I am simply going to give them a definition of wantonness, wanton conduct, tell them that applies in the event they find that they have answered for instance on the interrogatories, if they have answered "No" to Number 1, that there was no hiring, and they have answered Number 2 in the affirmative, then they turn their attention to 3 and 4. If the brakes were not in proper working order then they can answer Number 4 to see whether or not it was wanton, because the only wanton conduct I can see in there would be in connection with the brakes. (319) In other words, your negligence, your ordinary negligence so far as the operation of the vehicle is concerned comes from your inference of negligence, doesn't it, and the wantonness therefore must come from what you say about the equipment, the failure to inspect, that sort of thing.

MR. WEBER: Our purpose, in *Randall vs. Stager*, we feel that is the clearest explanation of it, is the statement that wanton misconduct or wilfulness is never inferred, it must come from the evidence, that negligence may be inferred or presumed but when you get to wanton misconduct you must have the evidence.

THE COURT: I think that is a correct statement of law. If I don't satisfy you on that point, you call that to my attention in those very words, I will do so.

I will refuse Number 5.

Well again Number 6 I see is the same as the *Torts Restatement*. We already have that, so I will refuse that on the ground that I will have covered it.

Well, that is my instructions, gentlemen.

*Requests for Instructions*

I am not going to speak on Workmen's Compensation. I don't think Workmen's Compensation has anything to do with this case. If they find it was necessary to hire him—well, wait a minute; I am not going to say anything.

MR. KNOX: No he is not covered by the Act. The courts never indicated that.

(320) MR. WEBER: I differ with you. I found some authorities last night.

THE COURT: We will try the case anyway; I haven't gone into that.

MR. KNOX: Casual helper.

THE COURT: Here is the point of that. You have got this, I don't know whether even though it is hearsay, whether he can make Ormsbee an employee for compensation purposes without the consent of the employer even though he is an emergency; the cases say he can?

MR. WEBER: The cases as far as I found last night say if the circumstances were met that it was necessary in the conduct of the employer's business and he becomes an employer.

MR. GORNALL: In the ordinary conduct of his business.

THE COURT: You fellows are in a little bit of a dilemma. You want the jury to find he hired him or engaged him, therefore you touch, you draw yourselves near to this employee's situation, see.

MR. KNOX: I think the court has never taken one of these helper cases on a truck and cleared it as a Workmen's Compensation case.

THE COURT: I am not going to do that today.

MR. WEBER: All the cases I have read, they have (321) never taken the helper on a truck and sustained any verdict in their favor:

THE COURT: The ones that are sustained pay off, you see, they don't get in the books.

Well Number 8 means just it is an item of contributory negligence, doesn't it?

MR. WEBER: Assumption of risk.

MR. KNOX: The question is whether he realized these brakes were bad. No evidence of that.

THE COURT: We are just talking here about whether or not he himself was guilty of contributory negligence.

MR. WEBER: Whether he assumed the risk.

THE COURT: We don't talk about the assumption of risk in federal courts; that is a word that we don't use. *since when*

MR. WEBER: All right.

THE COURT: You see what I mean.

MR. WEBER: If it is contributory negligence, if he knew—

THE COURT: If he is a guest and steps in there as a guest, knowing the conditions, just like sitting in a car going ninety miles an hour he is contributorily negligent of course. It is a factual issue.

*Requests for Instructions*

MR. MacKRELL: The difference between the contributory negligence and assumption of risk would be contributory negligence would not be a defense to any wanton con- (322) duct, while assumption of risk would be.

MR. KNOX: I think you have got to find he knew the condition of the brakes.

MR. WEBER: He must have been hired for some purpose. If the purpose was as alleged, the defective condition of the brakes, the need for a helper in case of a breakdown, then Ormsbee knew about it.

MR. KNOX: No, he didn't. Even your man in Buffalo didn't know the brakes were as bad as that. He could have easily found out.

MR. GORNALL: He is a mechanic.

THE COURT: There is a bit of dilemma there on the assumption of risk if he is an employee, but that amounts to binding instructions and I am not going to bind that. That will be refused.

MR. KNOX: 9 is all right, about the qualifications under certain circumstances applied, or consent will be implied, authority will be implied.

MR. WEBER: Is that 10?

THE COURT: You have got 9, 10, 11 and 12, are all taken from Byrne vs. Pittsburgh Brewing Company. I just had my secretary write up some paragraphs on that case that I am going to use. I don't know whether you used the exact language; I tried to use the exact language.

MR. KNOX: Isn't your Honor going to cover that (323) in the charge?

THE COURT: I think so. That is why I will refuse 9, 10, 11 and 12. I have got that. I will refuse these as covered in the charge.

All right, now look at your copy of the special verdict. You can use those of course if you want to, because I will pinpoint them to the jury. You may want to go over these in your summations, indicate how you want them answered, what the circumstances are.

Number 1 I think is directed at one of the issues here. I have said, you see, you notice there I refrain from saying just what his status is. I don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law. We might have to look at that afterwards, it depends on what you think of it.

Number 2 relates to negligence alone.

As I mentioned, Number 3 relates to braking equipment.

Number 4 relates to the wanton conduct. I am going to read that business on the Restatement of Torts.

MR. WEBER: We attempted to frame similar interrogatories.

THE COURT: I don't have any great objection to yours except that it's been my experience I don't like to (324) submit too many to the jury. Three or four, even four is about the limit.



*Colloquy*

MR. KNOX: Even four gets pretty close to the point where the jury is liable to get confused.

MR. WEBER: The one that we have that you do not include was, "Was Norman Ormsbee aware of any defective or dangerous condition when he entered the truck?"

MR. KNOX: I think that is too simple a statement, gets to the question of degree.

THE COURT: Now listen. What is that situation? That relates to one of two things, that contributory negligence, or as you fellows say, presumption of risk. As against that, he is entitled to that presumption he acted in due care, see. He is dead, isn't he, so what do you make out of it? In other words, it is up to you fellows to prove as against the presumption he was entitled to, whether he acted in due care, that he knew, and the facts in the case, evidence in the case overcomes that presumption.

All I am going to do is charge generally on that subject of contributory negligence according to proof and presumption of due care in his favor.

MR. WEBER: You are going to charge on contributory negligence, that is in so far as—

THE COURT: I think contributory negligence is in this case like it is in every case. There isn't much (325) proof on it, nevertheless you have to charge on it.

MR. WEBER: But that contributory negligence on his part under these facts would be entering the truck with knowledge of a defect.

### *Colloquy*

**THE COURT:** That's right, as against the presumption that he acted in due care, and if he is—

**MR. KNOX:** The burden is on the defendant to show he didn't.

**THE COURT:** That's right. The one who asserts contributory negligence has the burden of proof.

**MR. WEBER:** Also a presumption in favor of Schroyer.

**THE COURT:** Not as against this fellow. This fellow has got a claim; there is no litigation against Schroyer, so we have no presumption in his favor here.

**MR. WEBER:** He is the agent or servant of the defendant. The defendant is being charged that because of his actions—

**MR. KNOX:** I think in Kissel against Motor Age, under I.C.C. certificate, as far as I know there is no case in Pennsylvania that implies the presumption against the defendant.

**THE COURT:** Schroyer is not a defendant. He is not a litigant. That presumption is for the benefit of the litigant in the case.

**MR. WEBER:** You find it improper in any way to (326) mention the fact that Schroyer's estate or Fidler are not defendants in this case because of jurisdiction?

**THE COURT:** What?

**MR. WEBER:** The jury may not infer from the fact that Schroyer's estate, or Fidler are not defendants with Aetna, is a matter of jurisdiction or reasonable—

*Colloquy*

THE COURT: I don't know whether they are or not. I am not going to infer anything.

MR. WEBER: As a matter of argument—

THE COURT: There is no argument. You fellows can't argue cases, civil cases.

MR. KNOX: You could have brought them in as party defendants.

THE COURT: You could have brought him in as a third-party defendant.

MR. GORNALL: That is a whole new field you are bringing up at this late stage.

MR. KNOX: They could have been brought in for purposes of contribution.

THE COURT: There are many ways the case could have been sued. They could have sued in the Common Pleas Court and sued Schroyer plus the defendant. The fact why they do certain things is none of my business. I think we have to stick to the facts in an argument in a civil case, what we have to litigate.

(327) MR. KNOX: I assume your Honor will instruct as to the duty of maintaining brakes in working condition under Pennsylvania law.

THE COURT: Well, just what is the law on that subject?

MR. KNOX: Kissel against Motor Age.

THE COURT: If you have got the statute I will read it. Where is it?

MR. KNOX: The first section in that, then I.C.C. regulations say all brakes should be maintained in good working order.

**THE COURT:** This is a good section to read. I will read this.

**MR. KNOX:** Here your Honor, here is a parts and accessories regulation of the I.C.C.: "All brakes with which motor vehicles are equipped shall be operative at all times except as provided in . . ." etc. etc.

**MR. GORNALL:** In other words, the Interstate Commerce Commission imposes this duty on Aetna, your Honor, because they operate these rights.

**THE COURT:** All right, if you have got specific matters here—I was going to charge generally, but I will have my secretary copy it.

All right, gentlemen; what else?

**MR. WEBER:** The only thing in the special verdict (328) that we would like to propose is a finding of whether or not Ormsbee was a trespasser on the truck.

**THE COURT:** I think that is included in my Number 1.

**MR. KNOX:** Yes.

**THE COURT:** In other words, the finding of trespasser is a conclusion of law.

**MR. KNOX:** The same as employees.

**THE COURT:** I withheld that exact finding. We are going to talk about it of course, but the finding I think will be governed by, Number 1, if they answer that "No", why then I think the court will review the matter, no matter what was decided, will look at the case as though he was a trespasser; then on review of this evidence if they answer that Number 1, in review

*Colloquy*

of that evidence if there is insufficient evidence to show wanton conduct, you are all right. On the other hand, if they find wanton misconduct on those brakes, that is a different proposition.

I want to say this, if at the end of the charge you think of additional matters—this is a type of case that is a little out of the ordinary in the sense of these duties and so on—you call the court's attention to it. You have got to protect your rights as to what you want in there, you see.

(329) Ordinarily an F.E.L.A. case, a straight negligence case would go just like that, but this is a little different, so I will hear you at the conclusion of the charge if you want any additional matters read to the jury.

MR. WEBER: In connection with the Interrogatory number under *Byrne vs. Pittsburgh Brewing*, the unforeseen contingency, they require the element that it is an emergency that the driver cannot perform himself and the situation is such that the necessity is for assistance in performance of the master's work. We believe that phrase "an unforeseen emergency arose which Schroyer was unable to handle himself" ought to be added there.

MR. KNOX: Made it reasonably necessary for the protection of the defendant's interests. Defendant's interests, not driver's interests.

THE COURT: They are going to have your instructions along with it and it is true that might possibly be worded in several different ways and still say practically the same thing, and under the evidence



1104

*Colloquy*

in this case you have got to take it as you find it. I will agree with you there isn't too much there to show that he couldn't handle it. I don't know, frankly, what they expected this fellow to do, but this is their theory of the case based upon the evidence. I want to have the jury make a finding on (330) that. It might be that that isn't going to be enough, I ~~don't~~ know. May be they will answer it "No"; if they do, that will be all right, won't it?

MR. COOPE: I think there was a contingency but that isn't an emergency. It is quibbling, in that sense I think it is mere quibbling.

MR. GORNALL: The jury knows what a contingency is, an emergency. I think we are going to extend the whole charge.

THE COURT: You can't put everything in one sentence.

MR. COOPE: I like the interrogatories on this page right here then.

MR. GORNALL: This is an intelligent-looking jury to me.

THE COURT: If you have a dozen interrogatories you might as well not have any; they answer this way and that way. Maybe I should take them all and just leave it to the jury; I thought about that in this case.

MR. KNOX: I saw some cases the lawyers were attempting to complain for the purpose of confusing the jury.

*Colloquy*

THE COURT: You don't think these fellows are doing that?

MR. KNOX: No, but I have seen it.

MR. COOPE: This jury has a confusing situation, (331) it could very well not understand. We have no right to assume they are confused by us on account of it.

MR. KNOX: I think you have a high-class jury.

THE COURT: I don't agree entirely, I don't know that I agree with both sides or not in this case. There is some variance among those present in the room here.

MR. COOPE: That is what I mean.

THE COURT: By and large, I think they will have it in mind; I hope they will when they finish with the instructions and summations, they get the idea what you fellows are talking about.

MR. GORNALL: I am not worried about it; I will give it to them in my summation.

THE COURT: I guess that is it then, gentlemen.

(In open court.)

THE COURT: All right, gentlemen, I think we can proceed with the summations.

(Whereupon Mr. Weber and Mr. Gornall summed up to the jury.)

THE COURT: Take about 12 minutes recess.

(Recess taken.)

*Charge of the Court*

## V.

## CHARGE OF THE COURT

Willson, J. P.

## (332) THE COURT:

Members of the jury, this is our third day in this case, and I think you agree with me that we have had skilled and expert counsel trying the case, who have gotten along very well in a judicial atmosphere and without any bickering. The attorneys have seen to it that the evidence and testimony they want to bring out has been produced before you.

Now very shortly you are going to have the case to decide, and it seems to the court that most everything has been said that can be said about this case. No doubt the jury has in mind that if we spent another week here they couldn't find out any more than what they know about it at this time.

Needless to say, in the United States Court that you sit in, you want to go upon your duties without any prejudice or bias or sympathy in the sense that you are just going to decide a case in favor of somebody, period. You want to decide this case on the evidence.

Now, the duty of the judge, my duty in this case is to instruct you on the law to be applied, and to point out the issues. It is your duty to recall the testimony and the evidence, sifting over it carefully, and come to your conclusion, come to your decision.

## *Charge of the Court*

I will give you first—the case naturally (333) divides itself into two questions; first, an issue of liability; whether there is any liability of course, then if there is liability then the question is the issue of damages, so we will speak first on the issue of liability.

The case comes to this court because of what we call diversity of citizenship. This is an interstate carrier under the rights of the corporation, and the decedent Ormsbee lived in Pennsylvania, so it is a proper case to be decided in a federal court, but we apply the law of Pennsylvania and the federal law so far as it relates to the Interstate Commerce Commission because it was operating interstate under I.C.C. regulations.

Negligence has been defined as the want of due care under all the circumstances of the case; that is, the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

The occurrence of a collision does not raise the presumption that the driver of the vehicle was negligent. This is a question of fact for you to determine from all of the evidence in the case.

I have just defined negligence. It is very short, and means failure to use due care, want of care under the circumstances.

(334) There are two phases to this case on the question of liability. The one relates to the question of negligence, that is ordinary negligence, failure to exercise care. If you or me in driving an automobile, in starting out on a trip take with us—being the owner and operator of a car—

take a passenger with us, fail to exercise due care under the circumstances—negligent operation of a car I think is quite familiar to most of us today, what we mean by it—and if you are guilty of negligence in that situation of course there is liability to an injured guest, to a passenger. That is the first phase of this case.

Now I will speak of the wanton conduct that has been mentioned by counsel and which you remember, but what I say now relates generally to the proposition of liability. Now, whether it is wanton conduct or negligent conduct, or negligent conduct of itself is not sufficient. That conduct must be the proximate cause of the injury. Perhaps the best as well as the most widely quoted definition is that the proximate cause of any injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred.

Contributory negligence may be in this case, if in the judgment of the jury the facts warrant it. Contributory negligence is the negligent act of a plaintiff which (335) concurring and cooperating with the negligent act of a defendant, is a proximate cause of the accident or a contributory factor in bringing it about. I have used "the plaintiff"; it would be the decedent Ormsbee in this case.

Now, where a defendant relies upon the defense of contributory negligence, the burden is upon the defendant to establish contributory negligence on the part of the plaintiff by the preponderance, or the weight of the evidence.

In this case, in your deliberation and in arriving at your verdict you will bear in mind that in civil cases, of



### *Charge of the Court*

which this is one, the plaintiff has the burden of establishing the case by a preponderance of the evidence.

In considering this case, you will examine all of the material evidence in order to determine its relevancy and the true state of facts, and you will weigh all of the evidence for and against each side so as to reconcile if possible such evidence as may have seeming or apparent conflicts, and in considering and weighing the evidence, you should use the same judgment, reason, common sense and general knowledge of persons and affairs as you do in everyday life; so that the requirement is, plaintiff must prove the case by a preponderance of the evidence, and the plaintiff has the burden of proof.

Preponderance of the evidence—you no doubt will understand this term—has been defined as that evidence which after a consideration of all of the evidence is in the judgment of the jury entitled to a greater weight, or stated in another way, the phrase “preponderance of the evidence” means that evidence which points to a certain conclusion appears to the jury to be more credible and probable than the evidence to the contrary. It means such evidence as when weighed with that which opposes it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

In a case of this kind, the credibility of witnesses is very important; that is the believability, which witnesses you believe in the case. In your consideration of this case, you must also take into account the credibility of witnesses of which, incidentally, you are the sole judges. With that the court has nothing to do. You may judge the credibility of a witness by the manner in which he gives his testimony,

### *Charge of the Court*

his demeanor upon the stand, the reasonableness or the unreasonableness of what he says, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against any of the parties, or any circumstances tending to shed light upon the truth or falsity of such testimony and it is for you to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to (337) any material fact in this case, you are at liberty to disbelieve the testimony of that witness in whole or in part, or believe it in part and disbelieve it in part taking into consideration all of the facts and circumstances of the case.

Now, there's been an expert witness. I think there's been one expert offered, and you will examine the testimony of the expert witness, I think Mr. Mayr. I don't know if there was any other expert offered or not. In other words, you look at their training, their experience in the line in which they testify the same as you do any other witness, and give weight to what they say in accordance with your best judgment as to the credibility due that witness.

Now, as I mentioned, we apply the rules of the road of the Commonwealth of Pennsylvania. That means of course that the Supreme Court of Pennsylvania, the decisions, announcements of that court are the law of this state. The Supreme Court of Pennsylvania in a very recent case has said this is the law of Pennsylvania, and this is what I instruct when the driver of a car crosses over on his wrong side of the road and strikes another car on his right side of the road, a prima facie case of negligence is made out against the first driver. Now, that same principle applies when a driver leaves the highway and (338) does an

## *Charge of the Court*

injury or damage. In other words, if you leave your lane of traffic, do damage, commit an injury, commit a wrong, a prima facie case of negligence is made out.

Now then, the court said the representative of the victim of a driver who drives completely off the highway with such velocity that the car overturns numerous times, has no legal burden to explain the mechanical, mental or muscular lapse which precipitated the wreckage.

There is a presumption then in this case under this evidence, if the jury finds of course, accepts the evidence that this car went off the road in the manner in which testified to, that is still a factual issue, there is the inference then of negligence on the part of the driver of the automobile, of the vehicle, Mr. Schroyer.

Now we come to this proposition that of course the defendant, a corporation, acts through its officers, its servants and agents, and when we are talking about the operation of Schroyer, the driver of the vehicle as distinct from any condition of the brakes, why we have this inference here that the driver Schroyer was guilty of negligence, and if you find that in negligent operation of the vehicle he drove it off the highway down in the gully, hit the tree, and which negligence was the proximate cause of the death of Mr. Ormsbee, then there would be liability in the ordinary sense of the (339) word, because of the want of due care, being negligent in this situation.

Now you have this issue on the question of ordinary negligence, whether or not Mr. Ormsbee regardless of anything else that has been said, was guilty of any contributory negligence in getting into the vehicle in the first place, or whether he did anything on the trip, so forth, that might have brought on his own death. If he is guilty of contribu-

### *Charge of the Court*

tory negligence to any degree, then there could be no recovery under the negligence doctrine of this phase of the case, but you have as against that, you have in his favor so to speak, the presumption of law that a person who loses his life in an accident of this kind is presumed to have exercised due care because of the natural instinct to preserve your own life. That goes along with any inference of contributory negligence. The two together are to be considered by you on that issue in the case.

We have in connection with the doctrine of negligence, the issue of negligence, the testimony and the evidence in this case as you recall about what was said there in the Jones Tavern. Now the law is that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. An exception to this rule is that a servant may engage an assistant in case of an emergency, where he is unable to perform the (340) work alone. The point to that is simply this, that you recall the rule of the I.C.C. that there will be no passengers, then I think Mr. Fidler mentioned that he was not to take hitchhikers, there was testimony there would be no riders on the truck, on the vehicle.

Now as related to negligence, the Aetna Freight Lines, the defendant in the case, would not be responsible for want of care, for negligence, unless the decedent, Mr. Ormsbee was in that truck with its permission, by its consent express or implied, and the law is that the driver can't give the consent, except in this case of emergency, and that is why this testimony brought out on the part of the plaintiff to indicate there was such an emergency there that authorized, they think under the law, that would permit Mr. Schroyer to invite Mr. Ormsbee to complete the

## *Charge of the Court*

trip with him, but unless you find in this case that an emergency arose and it was such an emergency that Mr. Schroyer was unable to perform it alone, that is his duties for the continuance of the trip because of what has been brought out here, if you accept the proposition that the brakes were bad, and if that was the type of emergency then he would be privileged to take on this assistant Mr. Ormsbee. In that event, ordinary negligence if there was ordinary negligence, Mr. Ormsbee being free of contributory negligence would support a verdict for the plaintiff (341) based on ordinary negligence, without any relation to Count 1, but again, except as the driver could confer such right, the plaintiff stood in no relation with the defendant whatsoever, the latter owed him no duty of protection. It is a rule universally recognized that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. It is upon the exception to this general rule which is quite as well settled as the general rule itself, that the plaintiff relies in this case to establish the relation of master and servant under this evidence. The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but you have to find an emergency on the road confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected in the interests of the employer that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him to complete the trip.

With that I am going to mention the interrogatories to the jury. I am going to ask you to answer four questions. Number 1 relates to the proposition, "Under the evidence in this case do you find that an unforeseen con-



*Charge of the Court*

tingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles (342) Schroyer engage the decedent Norman Ormsbee to accompany him for the remainder of the trip?" and the words there "unforeseen contingency" mean the emergency that I have just mentioned, the inability of Mr. Schroyer to cope with it alone. If you think it reasonable that he engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative.

Number 2 is, "Was the defendant Aetna Freight Lines, Inc., negligent in the maintenance of the equipment or in the operation of the vehicle by the driver Charles Schroyer, either or both, which negligence was the proximate cause of the death of Norman Ormsbee, Jr.?"

Number 2 you see relates to ordinary negligence, want of care. Want of care might be the failure to maintain the brakes if you accept the testimony and the evidence that the brakes were not maintained, as well as the presumption of negligence arising from the fact the vehicle went off the road. So you may answer that, under this Interrogatory Number 2, if you find negligence in this case, depending on how you find the negligence, whether or not it is proved, negligence is shown by a preponderance of the evidence, and that the negligence is the proximate cause of the death of course of Mr. Ormsbee.

Now the proposition on the brakes, what the plaintiff has called, designated and relies on as you (343) understand as wanton misconduct, wantonness on the part of the defendant, comes from the testimony, the evidence as to the brakes.

*Charge of the Court*

The law of Pennsylvania is—this is from the Vehicle Code of Pennsylvania, which would apply in this case—every motor vehicle using the highways of this commonwealth shall be equipped with brakes adequate to control the movement of, and to stop and to hold such vehicle; and another portion of the section, brakes shall be maintained in good working order and so adjusted as to operate as equally as practicable with respect to the wheels on opposite sides of the vehicle. Emergency brakes shall be adequate to hold such vehicle or vehicles stationary upon the grade upon which they are operated.

That probably doesn't apply, but the point there is brakes must be adequate to control the movement of, and to stop and to hold such vehicle, and maintained so as to do so. They are talking about multiple wheels, as in this case that operate on both sides of the vehicle, all wheels at one time, and you recall all this testimony. I don't review the testimony, I just point it out to you. I have no idea how this case should be decided, I am satisfied to just do my part. My experience has been the jury decides these cases, and I am thankful you decide the issues, and I don't (344) have to, I leave the work to you.

Now the I.C.C. regulation is, all brakes with which motor vehicles are equipped shall be operative at all times.

Both of these seem sensible. The brakes do the job they are supposed to, that is what it amounts to.

We come to this issue of wantonness, and we don't usually have a case involving this. No doubt the jury is not confronted with it, the court hasn't very often this issue of wanton misconduct with relation to the operation of a vehicle; it is usually a question of negligence, but because of the fact here in this case as the court understands

it, the plaintiff may be confronted with the proposition that the brakes may amount under the law to wanton failure to have proper brakes. If you find failure to have proper brakes, it may be wanton misconduct. This case has been tried on this theory, you are going to have to decide this issue.

Now to be wanton, an act must have been committed with reckless disregard for the rights of others. Wantonness then is a civil proposition still, and if it applies to this case, we want you to decide it, because it may be that you find that there was no emergency created there which would authorize Mr. Schroyer to take on this assistant. If he just simply steps into the vehicle and goes for a (345) ride along with Mr. Schroyer for Mr. Schroyer's own convenience and pleasure, why then the only liability on the part of the defendant can be if it is guilty of wanton misconduct, or wantonness in the operation of the vehicle and the maintenance of the vehicle with these faulty defective brakes that have been mentioned.

When I mention faulty brakes, I mean the contention is the brakes were faulty. It is up to you to determine whether or not they were, and you will notice I have said a wanton act must have been committed with reckless disregard for the rights of others.

Now the actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to him.

*Charge of the Court*

That is a definition taken from a book, but the actual application of it in this case would simply be this, it is a very clear-cut proposition presented to you by the plaintiff in this case, the theory of it being that if you accept the testimony that the truck in this trip was sent out and left Buffalo or some other place, pro- (346) ceeded on its way in violation of a common law of the law of the Commonwealth of Pennsylvania, the I.C.C. regulation with relation to braking equipment, defective brakes which would not operate to hold the vehicle, and of course the company, the defendant must know that it goes uphill, downhill and all around curves anywhere on the highway—if under these circumstances that vehicle is permitted upon the highways of this state on this night on this occasion, then I think the jury may find, you may find that is wanton misconduct and the defendant is liable to the plaintiff in this case for the death of her husband, whether or not there was ordinary negligence, or whether he was a trespasser, or whether or not there was an emergency whereby Schroyer was authorized to engage him as an additional helper.

Recklessness implies conscious appreciation of the probable extent of danger or risk incident to contemplated action, because if the company sent out defective brakes on the equipment on the highways, it may be very reasonable on their part to call it recklessness, or conscious appreciation of the probable extent of danger or risk incident to such action. If somebody is going to get hurt, not necessarily this man but somebody else along the road, if so, why that is wanton misconduct.

(347) That leads me down to the third interrogatory, "Do you find that the braking equipment upon the vehicle in question, considering its size and load and road condi-

1034

*Charge of the Court  
Requests for Instructions*

tions prevailing, was in proper working order on March 20, 1956?"

If you find, if you answer that question "No", that is, it was not in proper working order, then you come to the last interrogatory, Number 4, "Was the Aetna Freight Lines, Inc., guilty of wanton conduct in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the proximate cause of the death of Norman Ormsbee, Jr.?" You will answer that either "Yes" or "No".

So much for the liability phase of the case. Now I will go to damages in a moment. I want to read to you certain requests for instructions which the parties have submitted, which is the routine customary in the trial of one of these cases.

Number 1 on the part of the plaintiff, an agent has implied authority to employ an assistant where an unforeseen contingency arises making it impracticable to communicate with the agent's principal, and making the appointment of an assistant reasonably necessary for the protection of the interests of the principal entrusted to the agent, and if you find such to be the fact in this (348) case, then Norman Ormsbee, Jr., would not be a trespasser upon defendant's vehicle.

I think we have gone over it, I think that is a correct statement. Perhaps the court has given it before, still it is a correct statement of law, but you have to find the facts to see whether that law applies.

Number 2, even if you should find that Schroyer had no implied authority to engage Ormsbee as an assist-



*Charge of the Court  
Requests for Instructions*

ant or helper, that would not relieve the defendant Aetna Freight Lines, Inc., from liability for Ormsbee's death if the injuries causing the death resulted from wanton or reckless misconduct on the part of the defendant or its driver Schrover.

Well, I think I have gone over that. That relates to the wanton feature. That is a correct statement of the law.

Now Number 4, where a motor vehicle in clear weather and on dry pavement leaves the highway on a curve downgrade and crashes, the jury is justified in presuming negligence on the part of the driver from such circumstances.

I think I have given you that. That is still a statement of the law. Of course if the driver is negligent, why then the company is negligent, because he is the employee of the defendant in this case.

(349) The defendant has certain ones. Those that have been refused—some of them have been refused because I have given them—those that have been refused, I will not read.

Number 3 of the defendant, if the decedent Norman Ormsbee, Jr., was a trespasser while riding on the truck involved in this case, then the defendant Aetna Freight Lines, Inc., is under no legal duty to protect said trespasser from ordinary negligent acts.

I think that is clear to the jury. That is the last time I am going to mention that subject.

Number 4, if the decedent Norman Ormsbee Jr., was a trespasser while riding on the truck involved in this case, the only legal duty imposed on the defendant Aetna Freight Lines, Inc., is to protect the decedent Ormsbee

131a

*Charge of the Court  
Requests for Instructions*

from wilful or wanton misconduct in the management, direction and control of said truck, as well as operation of the truck.

Number 6 I have read, so I will refuse that. The others are refused, the last four, because I think I have given these in my charge.

> Now we come to the question of damages. To complete the charge, I have to cover all phases of the case. This phase doesn't take quite so much time.

Now you have in mind we have here as plaintiff (350) the administrator, but the administrator is suing on behalf of the wife and children of the decedent.

Assuming you find liability in the case, you are going to then direct your attention to the damages. Take the widow first. At the moment of this man's death, if she is entitled to recover anything she is entitled to recover the full pecuniary loss she suffered but without any allowance for mental suffering or grief or loss of companionship. The measure of damages is the monetary damages. For her the law can't restore the husband, can't bring back life; the only thing it can do is award damages.

Now in connection with the damages to both the wife and minor children, we have the principle that a father is required under the law to support his children and his wife. In addition to that requirement under the law, you have evidence in this case of what he did do. You have a young man so to speak, a young married couple; perhaps you might consider them just starting out in their married career, three and a half years I think up to now, about.

*Charge of the Court*

You must use your good sense, good judgment, your experience in life generally in applying damages in this case. You are not necessarily bound by just exactly what he has earned in the past. The life expectancy here is some forty years for this young man. The testimony is that (351) he worked irregularly as I understand up to now. On the other side, it might be said that at least he showed an inclination to work. Maybe as the years went along, a man of his education and his ability, physical endurance, physical capacity, so on, would have increased his earnings. All that however is for the jury to determine.

Now a wife, what does she have a right to expect from the earnings of her husband? She is entitled to maintenance, clothing, shelter, and the usual and ordinary enjoyments, entertainment, which come from and derive from the relation of husband and wife. That is the pecuniary benefits of the wife she is entitled to over the years in the future, and you have taken it as of the moment of death, you don't speculate as to what might happen in the future, what he might do, because he is dead then.

You have his condition, his age, of course his education, his health and all that sort of thing. We have his life expectancy which has been mentioned. How long he would have lived is of course difficult to say. The life expectancy table which has been offered is not in itself a standard, or it doesn't fix the number of years he would have lived. You may consider this evidence as one of the factors in enabling you to determine the question. Consider his personal habits as have been mentioned, which you got here from the testimony. Give each factor as much or as (352) as little weight as you think proper under the circumstances.

## *Charge of the Court*

As to the children of course under the law they are entitled to their support and maintenance until they become 21 years of age. I think all of you realize what that would amount to, their housing, clothing, the necessities of life, and any expenditures by way of pleasure that the father customarily, routinely bestows upon his children, money for movies, entertainment; so each child is to be entitled to that, the three of them, until that time.

You add all sums together and if you bring in a verdict it will be so much money. I can't tell you, I am not suggesting what it will be. You start out with one figure; that is the funeral bill—if you bring in a verdict—I think that is in the nature of a thousand dollars, you start out with that figure, then put it all together and bring in one round—I don't know how round it will be, bring in one sum, you see, and then it is administered under the laws of the Commonwealth. The federal government doesn't have anything to do with that.

Now assuming for instance, members of the jury, that you find for the plaintiff, you realize now the benefits that she receives and the children receive are extended over a period of time. They receive it piecemeal (353) so to speak. The wife is very seldom so fortunate that she gets today all she ever expects to get from a husband; he gives it to her by the week, by the month, whenever she can get it, see, so the law says that sum when you compute it, you just don't add and say, well over a year he is going to give her this much money, it amounts to so much for 40 years. When you get the grand total, you want to remember you are giving this administrator for her and the children the money today, whereas if he had

*Charge of the Court*

lived he'd have got it piecemeal over a long period of time, so you have to reduce that to its present worth that sum, you see, put it at interest, that you award, spread out, divided over a period of time his compensation equal to what she would have received had he lived and made the pecuniary payments and benefits, contributed to her.

The sum which represents what he would have earned during his lifetime had he not been killed, and to which I have previously referred is then to be reduced to its present worth, keeping in mind, however, that compensation for loss of earnings or for loss of benefits from the date of the accident until today is not to be so computed. You realize of course that any sum which you find is due the plaintiff is being awarded by you as of this date. This amount should naturally be less than the lump sum total; after all a lump sum of money received today is worth more than a number of smaller sums of an equal amount (354) equal total amount received over a longer period of time because the money when received can be invested and yield interest. The present worth of the lump sum may therefore be said to be that amount which invested at the legal rate of interest will be sufficient to give the plaintiff periodically the amount his earnings would have been for that period, and at his death the total amount will then have been completely exhausted. In other words, the payments over a period of time are to be computed, that you compute in the aggregate, are to be reduced to the present worth. In determining his total earnings, you should bear in mind that a man's power to earn in the normal course of events commences to slow down, when he is young increases, reaches a maximum at some time during his maturity, the figure then declines. It is a curve,



*Charge of the Court*

it is gradual. That is ordinary, customary, that is what happens, so take all that in consideration. This is particularly true of a manual laborer, applies perhaps in this case.

Now I am going to ask the attorneys for the plaintiff, are there any further instructions you wish to give to the jury, any corrections in the instructions already given?

MR. GORNALL: We have no corrections or objections, your Honor.

(355) THE COURT: All right. I will ask Mr. Weber for the defendant the same question.

MR. WEBER: I request the court in connection with contributory negligence, the knowledge of the decedent of the condition which he faced and the result of it, if the court will instruct further with regard to that.

THE COURT:

Members of the jury, the issue of contributory negligence, the burden is on the defendant which relies on the proof. As against contributory negligence you have a presumption this decedent acted with due care; you have the evidence as to what was said, that is, relates to the trouble, so-called trouble Schroyer said he was having with his brakes, or trouble generally, so take that in consideration in determining whether or not Ormsbee was guilty of contributory negligence. The burden is on the defendant to show the contributory negligence, but if you find contributory negligence, so far as ordinary negligence is concerned, then he is not to recover, then he may not recover.

*Charge of the Court*

Now if he by the same token—how does that apply to the case?

MR. GORNALL: I think you did a good job, I don't have anything.

**THE COURT:**

If he is contributorily negligent, I think if you find contributory negligence, if he assumed, (356) he knowingly went in the beginning knowing all the hazards, all that sort of thing, why then the plaintiff is not to recover for wantonness nor for ordinary negligence, but you want to keep in mind in this connection, remember the testimony we have heard in this courtroom that came out of the tavern as to the condition of the brakes if any, whether or not he knew about the condition of the brakes or whether Schroyer knew about it. Until after the thing was over, our testimony about the brakes comes after the examination was made you see as to the fact of, character and nature of the brakes, if they were defective. There is testimony that Schroyer of course, you remember he was having trouble with his brakes, so we will leave it at that.

Anything further?

MR. WEBER: No.

**THE COURT:**

Now the special verdict, which is interrogatories, the four interrogatories, you will answer them, if you find for the defendant you will answer those anyway if you find for the defendant, on the white sheet which is enclosed you just simply say "Find for the defendant", no negligence or wanton misconduct for those two interrogatories, you so find on the white sheet. You answer those four interrogatories consistently.

*Charge of the Court*

If you find for the plaintiff then you say, "We (357) find for the plaintiff", put it down on the white sheet.

I want to say to you, it is just noon, you have from now on to decide this case. I am not urging any speed. I want you to give this matter careful attention, because it is a serious proposition, no question about that, but there is no use dilly-dallying. When you are finished with this case we are going home till Monday morning, so I now leave it to you.

Swear the bailiffs.

MR. WEBER: We enter a general exception to the charge and especially to the refusal—

THE COURT: Wait till the bailiffs are sworn.  
(Bailiffs were sworn by the clerk.)

THE COURT: Go ahead, Mr. Weber, we will hear you.

MR. WEBER: General exception to the charge, and special exception to the refusals of the court.

THE COURT: All right.

You have the evidence now. Of course the photographs and everything else you take out with you. I don't know if they want that (Plaintiff's Exhibit 8); they can send for it.

(Whereupon at 12:05 o'clock p.m., the jury retired.)

THE COURT: Recess now.

(Whereupon the trial of this case was recessed.)

*Charge of the Court*

(358) Thursday, May 29, 1957, 5:20 o'clock p.m.

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Appearances:

As heretofore noted.

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(Jury in.)

THE COURT: Members of the jury, I understand you have agreed upon your verdict, is that correct?

MEMBERS OF THE JURY: We have.

THE COURT: Who has the verdict?

JUROR NO. 10: I have, sir.

THE COURT: All right, will you hand it in.

(Verdict handed to clerk and court.)

THE COURT: All right, everything is down very plainly, I think it is correct, that is, as to form. The clerk will take the verdict.

THE CLERK: Members of the jury empaneled in this case of Jackson D. Magenau, Administrator of the Estate of Norman Ormsbee, Jr., Deceased vs. the Aetna Freight Lines, Inc., at Erie Civil Action 433, harken to your verdict:

And now to wit this 29th day of May 1957, we the jurors empaneled in the above-entitled case, find the Aetna Freight Lines, Inc., guilty of wanton conduct, in failing to maintain the braking equipment on the vehicle in proper working order on the night of

*Verdict*  
*Jury's Answers to Interrogatories*

March 20, 1956, (359) which wanton conduct was the cause of the death of Norman Ormsbee, Jr.

We award the plaintiff, Jackson D. Magenau, Administrator of the estate of Norman J. Ormsbee, Jr., Deceased, the total sum of \$75,400—\$76,400.

So say you all?

MEMBERS OF THE JURY: We do.

THE COURT: Read the interrogatories.

THE CLERK: Interrogatories in the case of Jackson D. Magenau, Administrator of the Estate of Norman Ormsbee, Jr., Deceased, vs. Aetna Freight Lines, Inc., at Erie Civil Action 433.

Interrogatory Number 1: Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip? Answer: Yes.

Interrogatory Number 2. Was the defendant Aetna Freight Lines, Inc. negligent in the maintenance of the equipment or in the operation of the vehicle by the driver Charles Schroyer, either or both, which negligence was the proximate cause of the death of Norman Ormsbee, Jr.? Answer: Yes.

Interrogatory Number 3. Do you find that the (360) braking equipment upon the vehicle in question, considering its size and load and road conditions prevailing, was in proper working order on March 20, 1956? Answer: No.



*Colloquy*

Interrogatory Number 4. Was the Aetna Freight Lines, Inc. guilty of wanton conduct in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the proximate cause of the death of Norman Ormsbee, Jr.? Answer: Yes.

So say you all.

THE COURT: Let me see that verdict just a minute.

(Verdict handed to the courts)

THE COURT: I just want to clear that up. There is no question about the \$76,400, is that correct?

MEMBERS OF THE JURY: That is right.

THE COURT: That is all. Again I say the answers to the interrogatories are consistent with the general verdict, and the award was done very well as to manner and form and dispatch. The amount I don't even comment on.

This case is now over, you are discharged. Come back Monday, you are to report back Monday at 9:45, and maybe you will be on another case.

MR. WEBER: May I ask the jury be polled.

MR. GORNALL: I object. The jury has been discharged (361) charged.

THE COURT: I don't think it is necessary. The jury has answered the questions. Is there any doubt in anybody's mind?

*Order for Judgment*

MEMBERS OF THE JURY: No, sir.

THE COURT: That is the verdict, the unanimous verdict of all the jurors, is that it?

MEMBERS OF THE JURY: Yes, sir.

THE COURT: All right, we will leave it that way.

MR. WEBER: May I have an exception.

THE COURT: All right. Court is recessed until Monday.

(Whereupon at 5:30 o'clock p.m., court was adjourned.)

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VI.

ORDER FOR JUDGMENT

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And now, this 3rd day of June, 1957, pursuant to the verdict of the jury, answers to interrogatories submitted being consistent and harmonious, the Clerk is directed to enter judgment in favor of the plaintiff, Jackson D. Magenau, Adm. of the Estate of Norman Ormsbee, Jr., Deceased, against Aetna Freight Lines, Inc., in the sum of \$76,400.00, together with costs.

JOSEPH P. WILLSON,  
*U. S. Dist. Judge.*

*Motion for New Trial*

## VII.

## MOTION FOR NEW TRIAL

The Defendant, Aetna Freight Lines, Inc. through its Attorney, Gerald J. Weber, Esq. moves that the verdict of the jury in the above entitled case be set aside and that the judgment entered on the verdict be vacated and set aside and that a new trial be granted to the Defendant for the following reasons:

1.

Verdict is contrary to law.

2.

Verdict is contrary to the evidence.

3.

Verdict is contrary to the law and the evidence.

4.

The verdict is contrary to the weight of the evidence.

5.

There is no substantial evidence that the Defendant is guilty of negligence.

6.

There is no substantial evidence that the Defendant is guilty of wanton negligence.

## *Motion for New Trial*

7.

Court erred in refusing Defendant's Points for Charge numbered 7 dealing with the application of the Pennsylvania Workmen's Compensation Act.

8.

Court erred in refusing Defendant's Point for Charge numbered 8 dealing with assumption of risk.

9.

Court erred in admitting, under objection made by Defendant, the hearsay testimony of Mr. Brown and Mr. Jones.

10.

Court erred in submitting the issue of wanton misconduct to jury since the Plaintiff had not properly raised said issue in his pleadings.

11.

Court erred in admitting evidence of wanton misconduct since not pleaded.

12.

Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of Plaintiff's case.

13.

Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of all the evidence.

14.

There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

*Motion for New Trial*

15.

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

16.

Court erred in rejecting relevant and competent evidence offered by the Defendant with respect to earning power of decedent and support of family by decedent.

17.

Court erred in refusing Defendant's timely request that the jury be polled.

18.

Defendant reserves the right to offer additional reasons for support of this Motion after the transcript of the trial has been typed.

**GERALD J. WEBER,**

*Attorney for Defendant.*



**VIII.**

**MOTION FOR JUDGMENT IN ACCORDANCE WITH  
MOTION FOR DIRECTED VERDICT**

Defendant, Aetna Freight Lines, Inc., through its Attorney, Gerald J. Weber, Esq. moves the Court to set aside the verdict and the judgment against the Defendant and to enter judgment for the Defendant in accordance with its motion for directed verdict upon the following grounds.

1.

The Court should have granted Defendant's motion for a directed verdict at the close of all the evidence because the Plaintiff's evidence was insufficient in law.

2.

All the evidence is insufficient in law to form a basis for a verdict for the Plaintiff.

3.

All the evidence establishes that Plaintiff's decedent had, as a matter of law, assumed the risk of the injuries sustained by him.

4.

All the evidence establishes that Defendant owed no duty to Plaintiff's decedent.

5.

Special interrogatory No. 1 by the jury classifies Plaintiff's decedent as an employee; exclusive remedy therefore lies in and under the Workmen's Compensation Act.

**GERALD J. WEBER,**

*Attorney for Defendant*

**Order****IX.  
ORDER**

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And now, this 15th day of November, 1957, defendant having filed motions for judgment notwithstanding the verdict and for a new trial and the case having been argued orally and briefs having been filed and duly considered:

1. Motion of defendant to enter judgment in its favor notwithstanding the verdict is denied; and

2. Motion of the defendant to vacate and set aside the verdict and judgment entered thereon and to grant a new trial is also denied;

A formal opinion stating the Court's reasons for the foregoing order is in the process of preparation but as the term at Erie has now ended it is desirable that the order be entered this date and the formal opinion filed in due course.

**JOSEPH P. WILLSON,**  
*U. S. Dist. Judge.*

X.

OPINION

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Willson, District Judge

This diversity case was tried to a jury. Norman Ormsbee, Jr. was found dead about 11:20 p.m. on March 20, 1956 at the bottom of a winding S-curve near a wrecked tractor-trailer owned by Daniel Fidler and leased to defendant Aetna Freight Lines, Inc., and operated by it under its interstate commerce commission motor carrier certificate. So far as the evidence in this case shows, decedent was last seen alive as he entered the cab of the tractor between five and six p.m. of the same afternoon.

Decedent was born July 29, 1935, and thus was not yet 21 years of age at the time of his death. He left a wife 18 years of age and three children, ages 2 years, 1½ years and 6 months, all dependent upon him for their maintenance and support.

The jury returned a verdict for the plaintiff as administrator of decedent's estate in the sum of \$76,400. Defendant has motions pending for judgment notwithstanding the verdict and for a new trial.

Whether decedent's status on entering the cab of the tractor was that of an invitee or an employee of defendant or a trespasser, was a contested point. This issue was raised in the pleadings, discussed at pretrial and controverted throughout the trial.

This case was called for pretrial on May 22, 1957 at Erie, and during the pretrial, counsel for the defendant

*Opinion*

called the court's attention to a motion for summary judgment which he had filed on April 4, 1957. As appears in the pretrial record, Gerald J. Weber, Esq., counsel for defendant, indicated to the court that the motion had been filed after the May, 1957 argument list had been published and he understood it would be considered at pretrial. It was considered at that time. The basis for the motion was that "the pleadings and depositions failed to allege and show that there was any relationship between decedent and defendant upon which defendant could be held liable for damages." The point was made that decedent was a trespasser and that at most, defendant owed the duty to refrain from wanton or wilful misconduct toward the decedent.

It is noticed at this point that the complaint averred that Ormsbee was riding as a guest passenger and invitee, having been offered a ride by the driver of the vehicle. It was mentioned at the pretrial that the evidence which plaintiff expected to produce would show first, that because of the alleged defective condition of the vehicle's brakes the driver was faced with an emergency which authorized him under the law of Pennsylvania to employ someone as an assistant and second, the proposition was discussed and plaintiff's contention was stated that assuming that plaintiff was a trespasser, nevertheless, this defendant is liable for his death if it engaged in reckless and wanton misconduct toward him under the circumstances. After considerable discussion on the two features mentioned, the court indicated that the pretrial should proceed, as the motion for summary judgment would be denied.

Thus it appears from the outset of this case, that defendant's position has been that decedent Ormsbee was a

*Opinion*

trespasser in the vehicle. Defendant has contended from the first that it did not hire decedent and that none of its employees had authority to engage decedent as a helper or assistant. In submitting the case to the jury, a special verdict was directed and in it the jury answered four interrogatories. The defendant's present contention is that by answering the first interrogatory in the affirmative, the jury has determined that Ormsbee, the decedent, was in the employ of the defendant and plaintiff therefore cannot recover in this case, but if plaintiff has any remedy, it is under the Workmen's Compensation Act of Pennsylvania.

This court does not agree with defendant's contention that the affirmative answer of the jury to the first interrogatory establishes that decedent was hired as an employee or became a statutory employee of defendant.

The interrogatory reads:

"1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver, Charles Schroyer, engage the decedent, Norman Ormsbee, Jr., to accompany him for the remainder of the trip?

"Answer 'Yes' or 'No': Answer: Yes".

It should be mentioned that under the law of Pennsylvania and Federal law, Aetna Freight Lines was responsible for the operation of the equipment under its I.C.C. certificate. See *Kissell v. Motor Age Transit Lines*, 357 Pa. 204; Interstate Commerce Commission Regulations, Section 207.4; and *Rosa v. Law*, 3 Cir., 193 F. 2d 894,



*Opinion*

The defendant concedes this point and did so at pre-trial. Daniel Fidler, owner of the equipment, hired the driver Schroyer, and he had been in his employ for but two weeks before the accident. Although at pretrial the status of decedent's relationship with defendant was raised and discussed, the interrogatory to the jury was not so phrased as to require the jury to determine whether decedent was an employee of Aetna. Fidler leased the equipment and his driver Schroyer to the defendant. The tractor-trailer outfit left Syracuse, New York on March 13, 1956. It was loaded with 35,912 pounds of steel consigned to the Crucible Steel Company at Midland, Pennsylvania. The route was via Syracuse to Buffalo. Schroyer left Buffalo on the morning of March 20, 1956 on a route which took him to Erie and southwardly from Erie on Route 19 to Waterford, Pennsylvania, in this district. Schroyer stopped at Jones' Tavern. While there he complained of tractor trouble to Mr. Jones and specifically referred to trouble that he had had with his brakes. Schroyer also complained of brake trouble to one Herbert Brown in the tavern and offered him \$25 if Brown would ride along with Schroyer to his destination. Brown refused. Thereafter Schroyer talked to Norman Ormsbee, Jr., plaintiff's decedent. According to Jones, the proprietor, who heard the talk, Schroyer promised to pay Ormsbee \$25 if decedent would ride along with him. Both left the tavern and were seen entering the cab. Mr. Schroyer got into the driver's seat and the vehicle was seen to start toward the south on Route 19.

At approximately 11:20 p.m., State Police officers were called to investigate a fatal accident on Route 68 near Rochester, Pennsylvania. At the scene of the accident, the police identified the two bodies, one as the driver of the

## Opinion

truck, Schroyer, and the other as plaintiff's decedent, Norman Ormsbee, Jr.

Thus, based on the evidence, Interrogatory No. 1 was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging decedent to accompany him on the remainder of the trip in protection of defendant's interests.

This court holds, based on the jury's findings, that the law of this case is that the decedent Ormsbee was not a trespasser in entering the cab of the vehicle.

Under the facts shown in this case, the plaintiff is not barred from bringing this civil action under Pennsylvania law. *D'Alessandro v. Barfield*, 348 Pa. 328, a decision of the Supreme Court of Pennsylvania on this point. In the *D'Alessandro* case, the Supreme Court had before it the issue as to whether a minor plaintiff at the time of the accident was the plaintiff's employee within Section 203 et seq., of the Workmen's Compensation Act. The minor plaintiff had been engaged by the driver of one of the defendant's vehicles used in early morning deliveries of milk. The boy had ridden on the vehicle with the knowledge of one of the owners. Nevertheless, the Pennsylvania court held that it was *only when the assistant is hired to perform services upon the employer's premises* that liability under the Workmen's Compensation Act applies. Recovery was permitted in a law action. That decision, together with *Kissell v. Motor Age Transit Lines*, supra, establishes in the case at bar the proposition of law that defendant is responsible for the negligent operation of the vehicle.

The two decisions together establish the further proposition that defendant is liable because the vehicle was operated under its I.C.C. certificate, for any damages re-

sulting from negligence in the maintenance of the equipment and its operation with defective brakes, if such negligence was the proximate cause of decedent's death. Liability is imposed because without the I.C.C. certificate, the interstate transportation of the cargo of steel in question in this case could not have been performed legally by the defendant. Thus defendant's motion for judgment notwithstanding the verdict and for a new trial based upon its contention that the remedy of plaintiff is under the Workmen's Compensation Act of Pennsylvania must be denied.

Although defendant in its motions assigns five reasons for a judgment notwithstanding the verdict and eighteen reasons for a new trial, in its brief the issues are divided into five categories. The first has been discussed. The remainder will be taken up in order.

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## II. DEFENDANT SAYS THERE IS NO EVIDENCE TO SUSTAIN THE FINDING THAT DEFENDANT WAS GUILTY OF WANTON CONDUCT

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The court put this issue to the jury in the form of an interrogatory as follows:

"4. Was the Aetna Freight Lines, Inc, guilty of wanton conduct in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the proximate cause of the death of Norman Ormsbee, Jr.?

"Answer 'Yes' or 'No': Answer Yes".

*Opinion*

The charge of the court on this phase of the case was based upon Section 500 of the Restatement of Torts, which was read to the jury.

Defendant asserts that the only evidence showing any connection of the defendant Aetna with the defective truck occurred in the trailer terminal at Buffalo where the terminal manager made an inspection of the truck and brakes. Defendant also makes the point that the rule of the Pennsylvania cases on wanton misconduct requires a test of foreseeability of danger to a known or identified party. Defendant cites *Cover v. Hershey Transit Co.*, 290 Pa. 551 and *Slather v. Jaffe*, 356 Pa. 238, and the Pennsylvania Annotation to the Restatement of Torts, Section 500. Defendant also says that actual knowledge of the peril involved is an essential element of wanton negligence. See *Tanner v. Pa. Truck Lines*, 363 Pa. 136; *Kasanovich v. George*, 348 Pa. 199; *Engle v. Reider*, 366 Pa. 411; and *Peden v. B. & O. Railroad Co.*, 324 Pa. 444.

On this point defendant's position is based upon the Restatement of Torts, Section 500, Comment B, entitled "Perception of Risk," as well as the cited cases, and the Pennsylvania Annotation to the Restatement of Torts, Section 500; page 255, where the quotation is found: "... This definition makes 'wanton' the equivalent of want of reasonable care in the presence of a known trespasser whose peril is also known."

However, under the facts in this case, it is believed that defendant's position is incorrect. The cases cited refer generally to persons on rights of way whose presence is known. This court agrees with plaintiff's counsel that defendant has only cited Comment "b" under Section 500 where the illustration given is the failure to inspect brakes.

This does not deal with a situation such as in the case at bar where it is known that something is wrong with the brakes. It is believed that this case falls under Sections "c" and "d" of the Restatement, which refer to the extent and gravity of the risk. Under "c" the paragraph concludes: "... It is enough that he knows that there is strong probability that others may rightfully come within such zone ..."

And also, under "d," referring to knowledge of presence of others within danger zone, "... It is enough that he knows that there is strong probability that others may rightfully come within such zone ..."

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### III. DEFENDANT SAYS THERE IS INSUFFICIENT EVIDENCE ON THE ISSUE OF PROXIMATE CAUSE

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Defendant's position on this issue is stated in its brief as follows:

"The record in this case is absolutely devoid of any evidence of the cause of this accident. All that we know is that the truck was found turned over on the bank of a hill beside and below the highway. There were no skid marks, there were no marks of any kind explaining the cause of the accident on the highway. There was not even any evidence to show that any brake trouble developed such as a dragging wheel, a burning of brakes or other trouble. The cause of the accident could have been just as well due to undue speed, being forced off the highway by oncoming or passing traffic, or many other reasons."



This court has in mind the familiar principles to be applied in considering the motion for judgment notwithstanding the verdict. The plaintiff has the verdict of the jury. The evidence is to be considered in the light most favorable to him, together with the reasonable inferences to be drawn therefrom to determine whether a right to recover exists. *Marsh v. Illinois Cent. R. Co.*, 175 F. 2d 498; and *Downey v. Union Paving Co.*, 3 Cir., 184 F. 2d 481.

Under defendant's II and III, the evidence of negligence, wanton conduct and proximate cause is as follows:

At the time and place of the accident, the road was dry, the weather was clear and there was no snow or ice on the pavement. Visibility was good. There were no skid marks on the pavement of the roadway, nor on the berm. The tractor-trailer had gone halfway through a downhill S-curve, at which point it left the road to the right, going down over an embankment where it turned over, coming to rest against a tree. Tire marks did, however, indicate the course or path that the vehicle took on leaving the pavement. It tipped out eight guardrail posts, broke a telephone pole and came to rest a distance of 202 feet from where the first guardrail was struck. There were tire marks on the berm indicating that the truck had traveled a distance of 60 feet before hitting the telephone pole.

After the accident, the rig was towed to Rosenberg's Garage in Beaver Falls, Pennsylvania. There one Joe Bushless was engaged by the Interstate Commerce Commission to conduct an investigation of the braking system of the wrecked vehicle. He was assisted by one Charles Novak and other I.C.C. men. The investigation took some four and one-half hours.

*Opinion*

The witness found that the airbrake system, that is, the rubber diaphragms inside the wheels, was in working order. He determined this by removing some 28 bolts and pulling the so-called "pancakes" apart. Next, the witness examined two of the trailer wheels. The brake lining was "down" on both of them. In speaking of lining, the witness said, "They weren't completely off, clear off, they were worn down to the cam; until the cam was turning over on them." The cam had turned down on the right rear wheel but was still working on the left wheel.

The witness stated that the turning over of the cam results when the brake lining goes down so far "that the cam turns over and locks the wheel" when the brakes are applied.

Bushless had thirty years experience as a mechanic and stated that he was familiar with the Pennsylvania requirements and that the trailer brakes would not pass Pennsylvania minimum inspection requirements.

All of the wheels were not inspected, but according to Bushless, he only inspected the two mentioned for the reason that the brakes on the opposite side of the axle from the examined brakes are usually in the same condition.

As mentioned, the driver Schroyer picked up his load at Syracuse on March 16, 1956. Due to bad weather, tire trouble at Batavia, New York, and a dead battery at Buffalo, New York, he was delayed for several days until on March 20, 1956, he was no further along on his journey to Midland, than Buffalo, New York. On that morning, Schroyer appeared at the Aetna Freight Line terminal in Buffalo and there he told Mr. Rice, the terminal manager, that among other difficulties, his brakes were giving him

*Opinion*

trouble in that they did not take hold fast enough. Mr. Rice then conducted an inspection to determine whether or not the brakes were applying properly.

The inspection by Mr. Rice consisted of the following: he had Schroyer pull the air brake hand valve down while the truck was standing still in order to determine whether or not the arms would move, which they did. He then got into the cab of the truck and pulled the truck ahead and then he tried the hand valve which applies the trailer brakes only, and discovered that it worked to his satisfaction. Next he put the truck in low gear with the hand valve still down and attempted to pull the truck ahead. The truck did not move. Mr. Rice then drove the truck 300 to 400 feet over a level blacktop driveway at a speed not exceeding 7 miles an hour and at that speed, he applied the brakes.

Plaintiff offered an expert, one Carl Mayr, as a witness. Mr. Mayr had had 36 years experience as a mechanic, with 22 of those years involving work with tractors and trucks. The witness operated a Mack tractor agency for three years. He was familiar with the Gramm trailer, having repaired them in the past. His testimony was that the proper procedure for inspecting the brakes of a tractor-trailer such as the one in this case is to remove the dust shields or brake shields which protect the brakes from getting dirt, sand and general foreign matter into them. If these are riveted on, then the whole wheel must be removed. The removal of these shields allows the inspector to get a good view of the braking mechanism and the brake lining. In inspecting a tractor-trailer such as this, one shield on a wheel must be removed from each axle, that is, one from the front axle and one from the rear axle. Gen-

*Opinion*

erally, the one on the low side of the road is pulled first and if it looks defective, then all the wheels are pulled. The minimum procedure to follow in order to properly inspect these brakes is to put your fingers through what is approximately a 3-inch space so that you can feel the drum and lining and thus determine the thickness of the brake lining. With both these inspection procedures, it is necessary to get underneath the truck. This witness was permitted to answer a hypothetical question based upon the assumption of the truth of certain facts in the testimony relating to the braking equipment. In response to the question put to him, this witness said that the brake linings "were worn out" at the time the equipment left Buffalo.

In order to service, maintain, repair and inspect their equipment, the defendant operates a station located in Girard, Ohio. This station has the total of three men, a Mr. Trask and two assistants who do all the maintenance, repair, servicing and inspecting of the defendant's huge fleet of some 300 pieces of leased and owned equipment consisting of tractors and trailers, that are used in the hauling of goods in interstate commerce. This evidence was introduced on the theory that defendant did not maintain servicing facilities nor employees who could adequately maintain and keep in repair its vehicles. It is noticed in this regard that the I.C.C. regulations which are incorporated in Title 49, Code of Federal Regulations, "Transportation," Subpart C—Brakes, Section 193.40, requires adequate brakes on all motor vehicles and Section 196.2 requires each motor carrier to systematically inspect and maintain all motor vehicles to insure that accessories are in safe and proper operating condition. Section 196.9 requires motor carriers to maintain systematically inspection and maintenance records.



*Opinion*

In connection with the testimony of Mr. Rice, defendant's agent at Buffalo who tested the brakes, it is noticed that Section 193.52, "Brake Performance," requires that the service brakes under all conditions of loading must be able to bring the vehicle to a stop at a distance of 30 feet from a speed of 20 miles per hour when tested on a dry, smooth, level road free from loose matter. Mr. Rice's test, it is apparent, did not show that the brakes measured up to this requirement.

Thus a recital of the evidence in the light most favorable to the plaintiff makes it apparent that judgment notwithstanding the verdict must be denied. See *Magee v. General Motors Corp.*, 213 F.2d 899.

Upon the whole evidence in the case there is a firm foundation for a finding that an unforeseen contingency arose which made it reasonably necessary for the protection of defendant's business that Ormsbee be engaged to accompany the driver for the remainder of the trip. On this phase of the case it is not to be overlooked that the driver Schroyer was the employee of Fidler. Fidler had no strict rule which prevented Schroyer from engaging help. According to Fidler, Schroyer had the authority to hire services and purchase necessities along the way without communicating with him. Defendant through Fidler and Schroyer is responsible to third persons for the ordinary negligence of Schroyer in operating the vehicle as well as the ordinary negligence of Fidler in maintaining and repairing the vehicle. Under the evidence the jury found that Ormsbee was lawfully on the truck. The defendant owed him the duty to use ordinary care and was liable for ordinary negligence. An inference of negligence can be found in the manner in which the tragic accident



occurred. The vehicle was going downhill on a dry road on a clear night. It left the pavement knocked out guardrails, crashed into a tree, after breaking off a telephone pole. In the operation of the vehicle as far as negligence is concerned, Schroyer is defendant's driver, and in permitting his vehicle to leave the highway and overturn under the unexplained circumstances is negligence. See *Kotal v. Goldberg*, 375 Pa. 397; *Shafter v. Lacock, Hawthorn & Co.*, 168 Pa. 497; *Eisenhower v. Halls Motor Transit*, 351 Pa. 200; and *Lacaria v. Hetzel*, 373 Pa. 309.

Of course, in addition to the inference of negligence as shown by the circumstances, the lack of braking power on the equipment is ample support for plaintiff's contention that defendant was negligent. Defendant itself was required to make an inspection before putting the vehicle on the highway, even though the equipment was leased from Fidler. The leasing regulations of the I.C.C., Section 207.4(c), require that before the authorized carrier takes possession of the equipment it is required to inspect the same in order to insure that the equipment complies with parts 193 and 196 of the Motor Carrier Safety Regulations. Defendant did not contend nor offer evidence that it made the inspection required under the Section. It was required under the regulations to maintain records of inspections, yet no evidence was offered that it had records of inspection of the braking equipment. It offered Fidler's testimony that he had put new lining on the trailer brakes in December, 1955, but this testimony was simply not accepted by the jury. This issue of fact as to the braking equipment was left to the jury in the second and third interrogatories and the jury finding was against defendant.

As to the wanton conduct of defendant failing to maintain the braking equipment on the vehicle in proper work-

*Opinion*

ing order, the fourth interrogatory, was submitted to the jury on this feature of the case and again the jury found against the defendant.

Considering the size and weight of the loads carried, the size and weight of this particular trucking equipment on the highway, the traffic conditions on the highways of the country and the foreseeability that tremendous damage and loss of life is likely to occur in the event that braking equipment on vehicles such as the one in question is not in a good state of maintenance and repair permits a finding of wanton conduct on the part of the defendant in this case. As mentioned, such a finding is not required to sustain the verdict. It can be sustained on ordinary negligence alone. Defendant having raised the point, it is still of no assistance in relieving it from the verdict and judgment. The conclusion of this court is that there is ample evidence of negligence, ample evidence of wanton conduct, either of which or both concurring, was the proximate cause of decedent's death.

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#### IV. DEFENDANT SAYS THE VERDICT IS EXCESSIVE AND IS NOT SUPPORTED BY THE EVIDENCE

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It is noticed on this phase of the case, defendant cites *Patton v. B. & O. Railroad*, 120 F. Supp. 659, *Armstrong v. Burke*, 97 F. Supp. 182 and several Pennsylvania decisions, one of them *DeSantis v. Maddalon*, 348 Pa. 296, and others. Defendant contends that the evidence in the case discloses that the decedent had a very uncertain record of employment, that he had worked at several jobs for short periods of time with long intervals in-between. Defendant

*Opinion*

says that he depended on his parents for support, food and clothing for his family. Defendant claims that no rate of pay was established. Defendant says that decedent's financial prospects were not attractive, as he had limited schooling; no arts or skills, and there was no indication of his becoming a steady worker.

Plaintiff, on the other hand, points to the testimony which indicates that decedent had a special skill as a mechanic, even considering his age. He was not yet 21 years old, but was married and had three children. Necessarily he had no long record of earning. Also, necessarily, says plaintiff, it is reasonable to rely on an inference that decedent had not reached the peak of the period of his earning capacity. When the amount of the verdict was announced by the jury, as trial judge it was felt that its size was reasonable, considering the evidence as to decedent's age, the degree of responsibility that he had already accepted as a young man and his tendency, as shown by the evidence, to engage in remunerative employment or occupations. It is true the evidence shows that he had not worked long at one place or engaged in one type of activity for too long a period. It is felt, however, that this was but natural under the circumstances, considering his age. He had employment from time to time and was maintaining his family. He had demonstrated an earning capacity and aptitude for working in the mechanical field. It is reasonable to expect that this decedent had not yet reached the full peak of his earning power.

It is interesting to observe that while defendant's motions were under consideration, a decision of the Court of Appeals for this Circuit in *Lebeck v. Jarvis, Inc.* was published (October 30, 1957). The court had under con-

sideration a contention that a verdict was excessive. Judge Hastie said:

"... But otherwise, any claim that the verdict has been excessive requires a trial court to decide no more than whether the jury has reached a result which could rationally and dispassionately be reached by laymen on the basis of evidence relevant to the several categories of legally recoverable damage."

In the present case, the several categories of damages other than funeral expenses are simply the pecuniary losses suffered first by the wife, and next by each of the three children. The decedent himself had a life expectancy of over forty-six years. He left a widow eighteen years of age. Under the Wrongful Death Act of Pennsylvania, a damage award such as the one in the present case is to be shared by the wife and minor children in the proportion they would take the decedent's personal estate in case of intestacy. 12 P.S. § 1602. Deducting expense items such as funeral, the jury award of approximately \$75,000 in this case, if the verdict stands, will be shared by the widow and the three minor children. The wife's share is \$25,000. Each of the children will have a share of \$16,666. The child William was approximately two years old at the time of his father's death. William has lost support for a period of 16 to 18 years. Norma Jean was one year eight months old and has been deprived of support for 17 to 19 years. Carol Ann was not yet one year old and it can be assumed that she has been deprived of the support of her father for a period of from 18 to 20 years. Such items of damage are legally recoverable under the law of Pennsylvania and the amount of the verdict appears reasonable under all of the circumstances.



*Opinion*

Two matters remain for mention. The first relates to defendant's objection to the admission of the testimony of Messrs. Brown and Jones as to the conversation between Schroyer, the driver, and other persons at the Jones Tavern. Schroyer, in the conversations about which the jury was permitted to hear testimony, related to the witnesses the condition of his brakes and the general difficulties he was encountering on the trip. He was seeking assistance. It is to be remembered that here was an employee within the course of his employment, in the process of performing his duties. It was not the case of an agent admitting possible liability after an accident. It is believed that the testimony was properly admitted. Schroyer was dead at the time of trial. Henry on Pennsylvania Evidence, Section 448, says "... Oral or written statements made by a person in the regular course of his business or professional duty are competent after his death, if made of his own knowledge and at or near the time the act was performed." It is believed that the testimony was properly admitted also, under Section 1523 et seq., of Wigmore on Evidence as being in the regular course of business. It also appears under the evidence in this case that there was no motive on the part of Schroyer to misinterpret the situation as to his brakes at the time of the conversations which were admitted in evidence.

Secondly, defendant says the court erred in submitting the issue of wanton conduct to the jury since the plaintiff had not properly raised this issue in his complaint. A short answer to this contention by the defendant is Rules 15(b) and 16 of the Federal Rules of Civil Procedure. Rule 15(b) says when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised



*Opinion  
Order*

in the pleadings. The pretrial record will show that the issue of decedent's being a trespasser and of wanton conduct on the part of defendant first was raised by defendant's motion for summary judgment. At pretrial, as previously indicated, the contentions and the evidence to be presented on these issues were reviewed with the plaintiff's counsel stating substantially what plaintiff's evidence on these points would be. There was no objection by defendant's counsel at that time on the ground that the pleadings did not allege wanton conduct on the part of the defendant. The objection was first taken during the trial when such evidence was offered. Under the circumstances, defendant was not prejudiced. It had ample notice of plaintiff's proof.

Finally, on review of the issues and the evidence in this case, this court is satisfied that there is substantial evidence in support of the jury verdict. This court believes that the weight of the evidence favors the plaintiff and that plaintiff's evidence is credible. The verdict is one permitted under all of the evidence introduced and as this court believes that justice has been done, a new trial will not be granted. *Magee v. General Motors Corp.*, supra, and *Eastern Air Lines v. Union Trust Co.*, 239 F. 2d 25.

(s) JOSEPH P. WILLSON,

*United States District Judge.*

November 27, 1957.



[fol. 227]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
Appeal No. 12,518

JACKSON D. MAGENAU, Administrator of the Estate of  
NORMAN ORMSBEE, JR., Deceased, Plaintiff,

vs.

AETNA FREIGHT LINES, INC., Defendant-Appellant.

STIPULATION—Filed February 20, 1958

It is hereby stipulated by and between counsel for the parties herein, that the time for Appellant to file printed Brief and Appendix be extended from February 21, 1958 to February 28, 1958.

/s/ JOHN E. BRITTON, Of Gifford, Graham, MacDonald & Illig, 615 Masonic Building, Erie, Pa.,  
Counsel for Appellant.

/s/ M. FLETCHER GORNALL, Esq., 709 G. Daniel Baldwin Building, Erie, Pennsylvania, Counsel for Appellee.

2/20/58 So ordered, Biggs, Ch.J.

[File endorsement omitted]

[fol. 228]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Title omitted]

MOTION TO STRIKE OFF APPELLANT'S REPLY BRIEF—  
Filed May 8, 1958

And Now, May 8, 1958, comes the Appellee, and moves the Court to strike off the reply brief filed and served in this case on May 6, 1958, the same not having been filed within fifteen days after March 31, 1958, when appellee's brief was filed and served, and the same being filed in violation of Rule 25 (1) of the rules of this court, and raising questions not contained in the statement of questions involved in violation of Rule 24(2)(b).

/s/ M. Fletcher Gornall, Jr., /s/ William W. Knox,  
Attorneys for Appellee.

Present: Maris, Goodrich & Hastie, JJ., Motion denied,  
By the Court, Maris J.

May 8, 1958

[File endorsement omitted]

[fol. 229]

IN UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 12,518

JACKSON D. MAGENAU, Administrator of the Estate of  
Norman Ormsbee, Jr., Deceased,

v.

AETNA FREIGHT LINES, INC., Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Argued May 8, 1958  
Before MARIS, GOODRICH and HASTIE, Circuit Judges

## OPINION OF THE COURT—Filed July 17, 1958

By GOODRICH, *Circuit Judge*.

This is an appeal from the District Court for the Western District of Pennsylvania upon a judgment entered in a death by wrongful act case in favor of the administrator of Norman Ormsbee, Jr. The recovery was based on the alleged negligence of the defendant and there was also a finding by the jury that the defendant was guilty of "wanton conduct." The defendant attacks the verdict and judgment on several grounds. The case is in federal court by diversity only and we look to the relevant Pennsylvania decisions.

The first question involves points of tort and agency law. The driver of the truck which was leased to the defendant, Aetna Freight Lines, Inc., had been encountering difficulties while enroute to Midland, Pennsylvania. A day or two prior to the accident there had been brake trouble which defendant's superintendent at Buffalo had endeavored to adjust. On the afternoon of the day in question the driver, Schroyer, stopped at Jones's Tavern at Waterford, Erie County, Pennsylvania. There he complained to the proprietor that he was having trouble with his brakes. Shortly thereafter the decedent, Ormsbee, and a man named Herbert Brown, entered the tavern. Schroyer offered Brown \$25.00 if he would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Ormsbee to accompany him and he agreed to for the price of \$25.00. The two men got into the tractor. This was the last time they were seen alive. Later that evening state police received a call and in answer thereto found the tractor-trailer off the highway over an embankment and both men dead. This is all the evidence we have except further details of the difficulties which the driver had had with this truck in the earlier part of his trip and the results of a post accident investigation.

The jury was given forthright interrogatories on this phase of the case. They are, with the answers thereto, as follows:



1. "Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?" Answer: "Yes."
2. "Was the defendant Aetna Freight Lines, Inc. negligent in the maintenance of the equipment or in the operation of the vehicle by the driver Charles Schroyer, either or both, which negligence was the proximate cause of [fol. 231] the death of Norman Ormsbee, Jr.?" Answer: "Yes."
3. "Do you find that the braking equipment upon the vehicle in question, considering its size and load and road conditions prevailing, was in proper working order on March 20, 1956?" Answer: "No."

The answer to the first question is attacked by the defendant as being based on insufficient evidence.

The rule of law governing the situation is not so difficult. It is stated in the Restatement as follows:

"If a servant is authorized or apparently authorized to invite persons upon the vehicle . . . of the master, a person so invited is a guest of the master and if the entry is for business purposes, he is a business visitor."

1 RESTATEMENT, AGENCY 2d § 242, com. b (Tent. Draft No. 4, 1956) (not in 1st ed.).

"Unless otherwise agreed, an agent is authorized to appoint another agent for the principal if:

" . . .

"(d) an unforeseen contingency arises making it impracticable to communicate with the principal and making such an appointment reasonably necessary for the protection of the interests of the principal entrusted to the agent." 1 RESTATEMENT, AGENCY 2d § 79(d) (Tent. Draft

No. 3, 1955) (same as in 1st ed.). See also illustration 5 to this section (ill. 6 in the 1st ed.).

The Pennsylvania cases emphasize the necessity of the "emergency." See, *e.g.*, *Jaeger v. Sidewater*, 366 Pa. 481, 77 A.2d 434 (1951); *Jacamino v. Harrison Motor Freight Co.*, 135 Pa. Super. 356, 5 A.2d 393 (1939).

Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done. [fol. 232] The jury's finding is a forthright answer to a forthright question. The trial judge who heard all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside.

The defendant strongly urges the proposition that if the evidence is sufficient to sustain the conclusion that there was an emergency situation to justify the conclusion that Schroyer had authority to employ Ormsbee to assist him, then the Pennsylvania Workmen's Compensation Act will be the sole basis for recovery. In rejecting this contention, the trial judge relied upon *D'Alessandro v. Barfield*, 348 Pa. 328, 35 A.2d 412 (1944). That was a case involving the "statutory employee" section of the statute, § 203, 77 PA. STAT. ANN. § 52 (Purdon 1952).<sup>1</sup> The Pennsylvania court said that § 203 was not involved, since the accident had occurred outside the employer's premises. There had been a judgment for the plaintiff in the trial court and the affirmance let this stand, the court saying that the "sole question" for its consideration was whether § 203 applied.

But *D'Alessandro* does not settle the argument of the defendant. It points out the definition of "employee" in § 104 of the statute which includes "All natural persons,

<sup>1</sup> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

<sup>2</sup> 77 PA. STAT. ANN. § 22 (Purdon 1952).

who perform services for another for a valuable consideration, *exclusive of persons whose employment is casual in character, and not in the regular course of business of the employer. . . .*" (Emphasis added.)

It is the exclusion part of the paragraph with which we are here concerned. Defendant concedes that the employment of Ormsbee was "casual," a correct concession as the discussion and authorities cited in *Skinner* will show.<sup>3</sup> [fol. 233] But to be outside the coverage of the act, the employment must both be casual and not in the regular course of business. The Pennsylvania Supreme Court has said that both conditions must be met. *Persing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928), is right in point. See also, *Booth v. Freer*, 133 Pa. Super. 594, 3 A.2d 205 (1938); *Sones v. Thompson Furniture Co.*, 163 Pa. Super. 392, 62 A.2d 116 (1948). "The regular course of business means an ordinary operation which may be required to carry out the master's work," said the court in the *Persing* case. This question, *Skinner* declares is "a question of law, and open to review."<sup>4</sup> We cannot escape the conclusion that the finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all.

Facts in the various cases applying the phrase vary widely, as one would expect. We are helped by the statement of principle in *Callihan v. Montgomery*, 272 Pa. 56, 72, 115 Atl. 889, 895, "The Legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance, and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ."

<sup>3</sup>1 SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW 100-10 (4th ed. 1948, Supp. 1958).

<sup>4</sup>*Id.* at 100 & n. 90. See, e.g., *Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953).

That, we think, is this case. The other matters raised do not require separate discussion.

The judgment of the district court will be reversed.

[fol. 235]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12518

JACKSON D. MAGENAU, Administrator of the Estate of  
Norman Ormsbee, Jr., Deceased,

vs.

AETNA FREIGHT LINES, INC., Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and HASTIE, Circuit Judges.

JUDGMENT—July 17, 1958

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

July 17, 1958.

[File endorsement omitted]

[fol. 237] Petition for rehearing covering 14 pages filed July 31, 1958 omitted from this print.

It was denied, and nothing more by order August 14, 1958.

[fol. 238]

IN UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 14, 1958

Present: MARIS, GOODRICH and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the  
above-entitled case is hereby denied.

By the Court

Goodrich, Circuit Judge.

Dated: August 14, 1958

[File endorsement omitted]

[fol. 240]

IN UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—August 21, 1958

Pursuant to Rule 36 (2) of this Court, it is Ordered that  
issuance of the mandate in the above cause be, and it is  
hereby stayed until September 18, 1958.

August 21, 1958

Goodrich, Circuit Judge.

[File endorsement omitted]

[fol. 241] Clerk's Certificate to foregoing transcript  
(omitted in printing).



[fol. 242]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Title omitted]

STIPULATION—Filed September 10, 1958

It is hereby stipulated by and between Counsel for the Plaintiff and Counsel for the Defendant that the stay of Mandate in the above captioned case be extended to October 15, 1958.

/s/ William W. Knox, Counsel for Plaintiff, 23 West  
10th Street, Erie, Pennsylvania.

/s/ M. Fletcher Gornall, Jr., Counsel for Plaintiff,  
709 G. Daniel Baldwin Bldg., Erie, Pa.

Gifford, Graham, MacDonald and Illig, By /s/ John  
E. Britton, Counsel for Defendant, 615 Masonic  
Building, Erie, Pennsylvania.

[File endorsement omitted]

[fol. 243]

IN UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Title omitted]

ORDER FURTHER STAYING ISSUANCE OF MANDATE—  
September 12, 1958

Upon consideration of the stipulation of counsel in the above-entitled case;

It is Ordered that issuance of the mandate be, and it is hereby further stayed until October 15, 1958.

Goodrich, Circuit Judge.

September 12, 1958

[File endorsement omitted]

[fol. 244]

## SUPREME COURT OF THE UNITED STATES

No. 439, October Term, 1958

[Title omitted]

## ORDER ALLOWING CERTIORARI—January 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

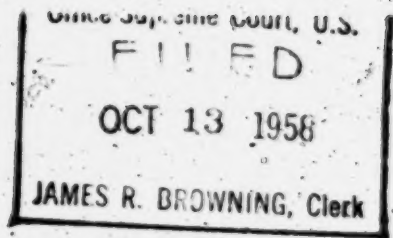
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.



LIBRARY  
SUPREME COURT. U. S.

No. 439



# Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

*v.*

AETNA FREIGHT LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY L. SHNIDERMAN,  
701 Union Trust Bldg.  
Washington 5, D. C.

M. FLETCHER CORNALL, JR.,  
WILLIAM W. KNOX,  
Erie, Pennsylvania  
*Attorneys for Petitioner*

COVINGTON & BURLING,  
*Of Counsel*

OCTOBER, 1958.

## INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	1
Questions Presented .....	2
Constitutional Provision and Statutes Involved .....	3
Statement .....	3
Reasons for Granting the Writ .....	11
Conclusion .....	25
Appendix A—Opinion and Judgment of the Court of Appeals .....	i
Appendix B—Constitutional Provision and Statutes Involved ..	vi

## CITATIONS

### Cases:

<i>Barnett v. Bowser</i> , 176 Pa. Super. 17, 106 A.2d 457 (1954) . . .	14
<i>Blake v. Wilson</i> , 268 Pa. 469, 112 Atl. 126 (1920) . . . . .	14, 16
<i>Boyd v. Philmont Country Club</i> , 129 Pa. Super. 135, 195 Atl. 156. (1937) . . . . .	14
<i>Butera v. Western Ice &amp; Utilities Co.</i> , 140 Pa. Super. 329, 14 A.2d 219 (1940) . . . . .	17
<i>Byrd v. Blue Ridge Rural Electric Cooperative, Inc.</i> , 356 U.S. 525 . . . . .	2, 11, 12, 13, 14-15, 20, 23-24
<i>Callihan v. Montgomery</i> , 272 Pa. 56, 115 Atl. 889 (1922) . 13, 16, 17	13, 16, 17
<i>Ciccocioppo v. Rocco</i> , 172 Pa. Super. 315, 94 A.2d 77 (1953) . .	16
<i>D'Alessandro v. Barfield</i> , 348 Pa. 328, 35 A.2d 412 (1944) . . .	15
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64. . . . .	7, 12, 14, 15
<i>Gearhart v. Summit Fast Freight, Inc.</i> , 167 Pa. Super. 481, 75 A.2d 606 (1950) . . . . .	15
<i>Heckman v. Warren</i> , 124 Colo. 497, 238 P.2d 854 (1951) . . .	19-20
<i>Humes v. United States</i> , 170 U.S. 210. . . . .	23
<i>Louisville &amp; Nashville R.R. Co. v. Parker</i> , 242 U.S. 13. . . . .	22-23
<i>Palmer v. Hoffman</i> , 318 U.S. 109, 119. . . . .	23
<i>Passarelli v. Monacelli</i> , 121 Pa. Super. 32, 183 Atl. 65 (1936) . . . . .	14
<i>Pennsylvania R.R. Co. v. Minds</i> , 250 U.S. 368, 375. . . . .	23
<i>Persing v. Citizens' Traction Co.</i> , 294 Pa. 230, 144 Atl. 97 (1928) . . . . .	14, 18-19



## Cases—continued

	Page
<i>Texas &amp; Pacific Railway v. Volk</i> , 151 U.S. 73, 78.....	23
<i>United States v. Atkinson</i> , 297 U.S. 157, 159.....	23
<i>Vescio v. Pennsylvania Electric Co.</i> , 336 Pa. 502, 9 A.2d 546 (1939) .....	14, 19
<i>Walters v. Kaufmann Department Stores, Inc.</i> , 334 Pa. 233, 5 A.2d 559 (1939).....	14

## Constitutional Provision and Statutes:

United States Constitution, Amendment VII .....	3, 15, vi
28 U.S.C. § 1254(1) .....	1
Rule 51 of the Federal Rules of Civil Procedure.....	3, 20-21, 24, vi
Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22.....	3, 16, vi-vii
Section 203 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 52.....	3, 10, vii
Section 302(b) of the Pennsylvania Workmen's Compensa- tion Act, 77 PURDON'S PA. STAT. ANN. § 462.....	3, 10, vii-viii
Section 427 of the Pennsylvania Workmen's Compensa- tion Act, 77 PURDON'S PA. STAT. ANN. § 872.....	3, 13, viii

## Miscellaneous:

SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW (4th ed. 1948).....	13
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# Supreme Court of the United States

OCTOBER TERM, 1958

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No.

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

v.

AETNA FREIGHT LINES, INC., *Respondent*.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, which reversed a judgment of the United States District Court for the Western District of Pennsylvania.

## OPINIONS BELOW

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals (App., p. i) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1958 (App., p. v). A timely petition for rehearing was denied on August 14, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

(1)

### QUESTIONS PRESENTED

The Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN.: § 1 *et seq.*, provides, in the absence of an express election to the contrary, an exclusive administrative remedy for the death of an "employee" who is not "casual" and whose employment is "in the regular course of the business of the employer." As a matter of State court practice, the "employee" status is held to be a "question of law."

This is a federal diversity case brought by petitioner for wrongful death. Respondent, at the conclusion of the taking of testimony, made no request for the submittal of the issue of "employee" status for resolution by the jury; nor did it object to the court's failure to instruct on this issue. A jury verdict was returned for petitioner. The District Court thereafter denied motions to set aside the jury's verdict. The Court of Appeals, adhering to State practice as to the court's function, reversed, ruling that the Workmen's Compensation Act applied, and the suit for wrongful death must be dismissed. The Court held that petitioner's decedent was respondent's emergency "employee", and his employment was in the "regular course" of respondent's business. Thus there is presented the same basic question as in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525. That question is:

1. In a diversity case in a federal court, is the issue of whether petitioner's decedent was an employee, and whether his employment was in the regular course of respondent's business within the meaning of the Pennsylvania Workmen's Compensation Act, a question for jury determination?

If certiorari is granted, the further question presented will be:

2. Where respondent failed to request the trial court to submit the issue of petitioner's employee status under the Workmen's Compensation Act to the jury for determination on proper instructions, but instead obtained an erroneous reversal by the Court of Appeals which treated the issue as a matter of law, should the jury verdict in favor of petitioner be now reinstated, or is there some necessity for retrial?

#### CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are Rule 51 of the Federal Rules of Civil Procedure, and Sections 104, 203, 302(b), and 427 of the Pennsylvania Workmen's Compensation Act (77 PURDON'S PA. STAT. ANN. §§ 22, 52, 462, 872). The texts of these provisions are set forth in the Appendix at pages vi-viii.

#### STATEMENT

This case was brought by petitioner in the federal district court on the basis of diversity jurisdiction. Petitioner, as administrator of the estate, sued for the wrongful death of Norman Ormsbee, Jr., a youth of twenty years, who died on March 20, 1956, survived by a widow and three small children. He died in a crash of a tractor-trailer operated by respondent. The truck was en route with 36,000 pounds of steel from Syracuse, New York, to Midland, Pennsylvania, a distance of 350 miles. The accident occurred near Rochester, Pennsylvania, when the truck failed to negotiate an S turn downhill. Petitioner's decedent, who had been riding in the truck for a short distance, and the driver,



Schroyer, were both instantly killed. The tractor-trailer was leased, complete with driver, to respondent by the owner of the truck, one Fidler.

The jury returned a general verdict for \$76,400, noting on the verdict slip, without direction by the court, that it found defendant "guilty of wanton conduct, in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the cause of the death of Norman Ormsbee, Jr." (R. 198a-199a). The jury also answered, in a fashion consistent with the general verdict, four special interrogatories prepared by the trial judge (R. 199a-200a), who prior to his advent to the bench had been an experienced Pennsylvania practitioner. Respondent's motions for a new trial and for judgment n.o.v. were denied by the trial court (R. 206a).

The Court of Appeals reversed the judgment below, holding that as a "question of law", which it could resolve, petitioner's status was that of an "employee" whose only remedy was under the Pennsylvania Workmen's Compensation Act. A timely petition for rehearing, principally addressed to a stay of proceedings, was denied.<sup>1</sup>

<sup>1</sup> In order to prevent the running of the Statute of Limitations, petitioner filed an administrative claim for workmen's compensation, which has remained dormant. Respondent denied responsibility and presumably is prepared to litigate once more the question of whether Ormsbee was an "employee" within the meaning of the Act. To prevent an unjust result, petitioner urged the Court of Appeals on rehearing to retain jurisdiction of this case by issuing a stay pending development of the Workmen's Compensation case—and particularly respondent's defense thereto. If certiorari is granted, petitioner reserves the right to urge this point once again, if this Court should disagree with petitioner's principal contention that the Court of Appeals erred in reversing the judgment below.



The evidence established that the respondent had operated defective leased equipment. In fact, as the trial judge noted in his opinion (R. 220a), neither respondent's evidence, nor any contention advanced by it, suggests that respondent made any routine inspection of Fidler's equipment before leasing it. Maintenance and repair of Fidler's truck was under the latter's control, although the equipment had been under lease to respondent for at least four years. Fidler himself did not perform such functions, but used an independent garage in a city near his home (R. 122a). Thus the ordinary repair of Fidler's equipment was certainly not in the hands of respondent.

Schroyer's trip from Syracuse which resulted in the double fatality was remarkably beset by a combination of unusual difficulties. Schroyer picked up his load on March 13, 1956, in Syracuse for a 350-mile journey which was expected to take 20 hours, including resting time. Because of the accumulation of unanticipated difficulties, Schroyer was still on his way seven days later when the accident occurred.

During the seven-day period that Schroyer was en route, he was constantly in touch with Fidler, who had hired him three weeks before and to whom he regularly looked for instructions (R. 122a-132a). For example, shortly after the trip commenced, Schroyer lost two tires in Batavia, New York. He communicated with Fidler, who proceeded from his base in Pennsylvania to Batavia with replacement equipment. Fidler there instructed Schroyer not to proceed under certain anticipated weather conditions, and then departed. Again, when Schroyer later encountered battery trouble in Buffalo, he was in touch with Fidler, who specified the garage to be used for repair. Moreover,

it required specific authorization by Ridler for Schroyer to obtain an advance of funds from the Buffalo regional manager of respondent (R. 64a).

After advising respondent's Buffalo representative about brake trouble, and after a wholly superficial test of the brakes was made, Schroyer proceeded to Waterford, just south of Erie, Pennsylvania, having completed slightly more than 230 miles of the journey. Schroyer stopped at Jones' Tavern just south of Waterford and there met Ormsbee and the latter's companion, Brown. Schroyer complained that he was having trouble with his equipment and offered to give Brown \$25 to ride with him for the balance of the trip, because he was afraid that he might run into more trouble. Brown refused, but Ormsbee accepted when the proposition was then put to him (R. 35a, 38a, 39a-40a, 48a).

Ormsbee was not authorized to drive in Pennsylvania, since his license there had been revoked (R. 106a). Moreover, there is nothing in the record to indicate that Ormsbee under any circumstances was expected to drive the truck, and in fact the evidence is that he was not driving the truck when the accident occurred (R. 19a, 49a). Ormsbee had had extensive experience with cars and had worked as a mechanic, although what Ormsbee was expected to do in the event of "trouble" was not defined.

The two men left the tavern, and were seen to proceed in a southerly direction, with Schroyer in the driver's seat (R. 49a). There is no further evidence of their whereabouts until the discovery of the wrecked vehicle some five hours later, with both men dead.

Respondent's chief purpose throughout the trial was to establish that Ormsbee was a trespasser, so as to

eliminate liability unless petitioner established wanton negligence.<sup>2</sup> The evidence shows that the truck carried a "No Rider" sign. Moreover, both Fidler and respondent had instructed Schroyer that he was to carry no riders. Schroyer, in a written response to a question as to the circumstances under which he might have a rider, responded "No time." This answer, according to the testimony, was the only one acceptable to the respondent, and thus represented its company policy (R. 132a, 141a, 142a).

In pursuing its purpose to show that Ormsbee was a trespasser, respondent made no effort to establish that any of its trucks were ever manned with two drivers; nor to show that they ever were manned with a driver and a non-driving mechanical or other assistant; nor to show that at any time in the past it had ever permitted anyone to ride on one of its trucks for a business purpose. And certainly it made no effort to show that any past emergency had ever necessitated an employee of respondent engaging either an emergency employee or an emergency agent on its behalf to ride on any of its equipment. The inference, rather, is clear that Ormsbee as a rider was performing a highly extraordinary and unexpected function.

At one stage of the trial, the judge informally commented to counsel that Ormsbee appeared to be a trespasser, but that the submission of special interrogatories might help clarify the jury's view on this and related questions (R. 119a). At the conclusion of the taking of testimony, the court in fact framed four pertinent special interrogatories which it submitted for

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<sup>2</sup> Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, involving one aspect of this Pennsylvania rule.

answers by the jury, to be returned along with a general verdict. Interrogatory No. 1 was to determine the jury's view as to whether Ormsbee was some sort of business licensee to whom respondent owed a duty of ordinary care. The interrogatory read:

"Interrogatory Number 1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?"

To this interrogatory the jury responded in the affirmative.<sup>3</sup>

In a colloquy with counsel, before submitting this interrogatory to the jury, the trial judge carefully noted that this interrogatory had been framed so as not to inquire whether Ormsbee was an employee of respondent, because that was a question of law for the court. The trial judge stated during this colloquy:

"Number 1 I think is directed at one of the issues here. I have said, you see, you notice there I refrain from saying just what his status is. I

<sup>3</sup> The other interrogatories inquired whether respondent was negligent, to which the jury responded in the affirmative; whether the braking equipment was in proper working order, to which the answer was in the negative; and whether respondent was guilty of wanton conduct in failing to maintain the braking equipment in proper working order, to which the answer again was in the affirmative. The jury thus found the necessary wanton conduct to make it immaterial whether Ormsbee was a trespasser, but also by its answer to Interrogatory No. 1 found that Ormsbee was not a trespasser (R. 199a-200a).



don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law. We might have to look at that afterwards, it depends on what you think of it." (R. 169a)

The respondent did not challenge this procedure of reserving the question for the court as to Ormsbee's status, and this is a matter of utmost significance.

Respondent submitted to the court certain requested instructions. Among these was its Request No. 7. This asked for a binding instruction to the jury that the Pennsylvania Workmen's Compensation Act provided the exclusive remedy if the jury found an emergency existed which justified Schroyer in hiring an assistant.<sup>4</sup> Respondent in due course excepted generally to the charge, and also excepted to the failure to give this binding instruction (R. 197a). However, although specifically invited by the court to ask that additional instructions be given the jury, respondent did not request the court to instruct the jury on the "employee" question, so as to permit the jury to decide the issue without a binding instruction (R. 195a-196a). Since this is important, it should be stressed that respondent did not request that the jury be instructed to consider and determine whether Ormsbee was em-

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<sup>4</sup> Respondent's Request No. 7 read as follows:

"If you find that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc. and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."



ployed "in the regular course of the business of the employer." Respondent did not even ask for an instruction to the jury to determine whether Ormsbee was an employee as opposed to an agent, and if so, whether he was an employee of respondent.

After the jury's verdict was returned, respondent moved for a new trial and for judgment n.o.v. Respondent contended that Ormsbee was a trespasser and that the record did not support either the special findings of an emergency situation, or of wanton negligence. Alternatively, respondent urged that Ormsbee was an "employee" within the meaning of the Workmen's Compensation Act, so as to bar the instant suit and provide an exclusive administrative remedy. Respondent conceded that Ormsbee's employment was "casual," within the meaning of the Act, but contended that the employment was "in the regular course of respondent's business."<sup>5</sup>

The trial court denied respondent's motion, and once again specifically called attention to the fact that Special Interrogatory No. 1

"was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging

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<sup>5</sup> Respondent also urged in its brief in support of its motions that Ormsbee was within the coverage of the Act because of a specific provision dealing with "employees of employees." One of the main point headings in respondent's brief was the following:

"The Pennsylvania Workmen's Compensation Act expressly provides that its provisions shall apply to employees of employees; 77 P. S. § 462."

See also, 77 PURDON'S PA. STAT. ANN. § 52. The trial judge in his opinion specifically rejected this contention, pointing out that the law applied only to "employees of employees" operating on respondent's "premises." (R. 211a).

decident to accompany him on the remainder of the trip in protection of defendant's interests." (R. 211a)

The trial judge thus reiterated the view that he had expressed before submitting the interrogatory to the jury that the interrogatory was so framed as to reserve to the court the question of Ormsbee's status as an "employee" within the coverage of the Act.

The Court of Appeals reversed the judgment below. The Court held that Ormsbee's status was a "question of law" and "open to review." In so deciding, the Court relied principally upon a secondary treatise on the Pennsylvania Workmen's Compensation Act, which dealt with State court practice.

The Court of Appeals, relying on Pennsylvania decisions, correctly defined "regular course of the business" as depending upon whether the employment was an "ordinary operation," or, stated somewhat differently, the "normal operations which regularly constitute the business" of the employer. The Court, however, surprisingly concluded that since Ormsbee was properly on the truck by virtue of the emergency, this

"put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all." (App., p. 5).

#### REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of this Court entered on May 19, 1958, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525. The *Byrd* case held that in a federal diversity case, the factual question of

whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. This Court decided that *Erie R. Co. v. Tompkins*, 304 U.S. 64, does not require that the federal court follow state practice when it is contrary to the federal rule favoring jury trial.

As is developed in the Statement, Ormsbee's status as an employee, and particularly his status as an employee in the "regular course of the business" of respondent, was treated below as a question of law for the court to resolve. The Court of Appeals reached its decision in reliance on Pennsylvania practice as to the function to be performed by the court.

The case below was briefed and argued prior to the announcement of this Court's opinion in *Byrd*. However, the Court of Appeals entered its decision on July 17, 1958, without any reference to the *Byrd* decision. It is a matter of importance to conform the practice in the Third Circuit and other circuits to that which will now prevail under *Byrd* in the Fourth Circuit.

The granting of certiorari is particularly appropriate in the instant case because it readily lends itself to summary treatment. With the clear delineation of the law in *Byrd*, this case could be disposed of on a Summary Docket basis, or by summary reversal. It is because of the latter possibility that the nature of the order of this Court is discussed in point 4, *infra*.

2. The recitation of the proceedings below in the Statement demonstrates the manifest failure of the Court of Appeals to follow the *Byrd* decision. Respondent, in the trial court, did not request that the jury be instructed to determine on the facts whether Ormsbee was an employee within the meaning of the

Workmen's Compensation Act, and more particularly did not request an instruction on Ormsbee's status in the "regular course of the business" of the respondent. The trial judge, in keeping with his view of Pennsylvania practice, was content to treat the issue as a matter of law. The Court of Appeals likewise held that the issue was a "question of law" for it to decide under Pennsylvania practice, although reaching the opposite conclusion as to the applicability of the Act.

The Court of Appeals specifically stated that it was deciding the question as one of law in reliance on *SKINNER*, a secondary treatise on the Pennsylvania Workmen's Compensation Act.<sup>6</sup> The Court quoted *SKINNER* as holding the issue to be "a question of law, and open to review." (See opinion, App., p. v). Here again, the parallel to *Byrd* is manifest, because *SKINNER*, in defining Pennsylvania practice, was primarily concerned with the circumstances under which a court might "review" the decision of the Workmen's Compensation Board, the administrative tribunal which decides compensation cases. The applicable statutory section, 77 *PURDON'S PA. STAT. ANN.* § 872, provides for an appeal to the courts from any action of the Board "on matters of the law." Consequently, while factual questions are for the administrative tribunal, questions of law may be reviewed by the court.

It will thus be appreciated that the underlying reason for the Pennsylvania practice declaring employment status to be a matter of law for the court is to permit judicial review of the decisions of the administrative board. *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl.

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<sup>6</sup> *SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW* (4th ed. 1948).



889 (1922); *Blake v. Wilson*, 268 Pa. 469, 112 Atl. 126 (1920); *Passarelli v. Monacelli*, 121 Pa. Super. 32, 183 Atl. 65 (1936); *Boyd v. Philmont Country Club*, 129 Pa. Super. 135, 195 Atl. 156 (1937); *Barnett v. Bowser*, 176 Pa. Super. 17, 106 A.2d 457 (1954).

However, the Pennsylvania practice has generally been carried over to tort cases brought in the state courts.<sup>7</sup> When issues of employment status arise, which possibly would defeat the action and require the plaintiff to look solely to workmen's compensation for relief, the courts hold that the question is a matter of law for the court. *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939); *Persing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928).

While the Pennsylvania practice of withholding from the jury the decision as to the applicability of the Workmen's Compensation Act is common, as can be seen from the instant case and the other cases cited *supra*, it should be pointed out that this practice is not basic. It cannot be deemed to be an integral and fundamental part of the Pennsylvania statutory scheme, so as to have some special claim for respect under *Erie R. Co. v. Tompkins*, 304 U.S. 64. See *Walters v. Kaufmann Department Stores, Inc.*, 334 Pa. 233, 5 A.2d 559 (1939).<sup>8</sup> Thus it would not do violence to the Pennsylvania statute for this Court to follow its "strong federal policy against allowing state rules to disrupt

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<sup>7</sup> This Court, in *Byrd*, noted that the South Carolina practice was similarly carried over from the procedure on review of decisions of the Industrial Commission. 356 U.S. at 536.

<sup>8</sup> In this common law action, the question of employment status was presented, though not the question of "regular course of the business." The issue was treated as a question for determination by the jury.



the judge-jury relationship in the federal courts." *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. at 538. In any event, the *Byrd* case has made it clear that jury trial of workmen's compensation cases is not a substantive issue on which the state rule must prevail under *Erie R. Co. v. Tompkins*, *supra*.<sup>9</sup>

3. In the instant case, there was a real question of employment status. If petitioner were to be barred from recovery for respondent's tortious conduct, it was for the jury, and not the court, to make that decision. The record provides a substantial basis from which the jury, if it believed the testimony, could infer (a) that Ormsbee was not respondent's employee at all, but a business licensee; or (b) that in any event, in the unusual situation prevailing, he clearly was not engaged in the "regular course" of respondent's business.

The complex relationship among the truck driver Schroyer, the lessor Fidler, and the respondent patently presents a jury question as to who, if anyone, was Ormsbee's employer when he was engaged by Schroyer during his stop at the tavern. Cf. *Gearhart v. Summit Fast Freight, Inc.*, 167 Pa. Super. 481, 75 A.2d 606 (1950); *D'Alessandro v. Barfield*, 348 Pa. 328, 35 A.2d 412 (1944). More importantly, a jury, if presented with the issue of employment in the "regular course of the business," could well have concluded that the extraordinary, but brief, mission of Ormsbee as a non-driving, but traveling mechanic or emergency helper, did not qualify him for workmen's compensation coverage. This becomes clear upon considering

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<sup>9</sup> The Constitutional guarantee of jury trial would likewise suggest the same result, though this issue was not reached in the *Byrd* case. 356 U.S. at 537, fn. 10.

the Pennsylvania courts' long-established construction of the statutory provision, 77 PURDON'S PA. STAT. ANN. § 22, which excludes "persons whose employment is casual in character and not in the regular course of the business of the employer."

The leading case in defining "regular course" is *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), in which the court stated:

"The legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ."  
(272 Pa. at 72, 115 Atl. at 895).

See also, *Blake v. Wilson*, 268 Pa. 469, 112 Atl. 126 (1920); *Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953). This test of "normal operations," quoted by the Court of Appeals in its opinion (App., p. v), does not require resort to any rigid formula for its application. It is a question of what inferences should be drawn from the facts.

The decision of the Court of Appeals, premised as it was on the erroneous conclusion that the question was one for it to decide, shows that it failed to face up to the question of the "normalcy" of the operation in which Ormsbee was engaged. The Court simply stated that "the hiring of Ormsbee put him into the regular business of defendant, namely, transportation of goods by truck." (App., p. v). (Emphasis supplied.) If anything is clear, it is that Ormsbee had nothing to do

with the transportation of goods by truck. He did not drive; he was not licensed to drive; and he was not expected to drive. If a breakdown had occurred, presumably Ormsbee would have helped in a mechanical or related capacity in meeting the "trouble" which led to his engagement in the first place. His services were not the "transportation of goods by truck," but the prospective handling of broken-down equipment owned by the lessor Fidler.

Of course it is possible for a company which is engaged in the "transportation of goods by truck" to perform other connected functions. These functions, if ordinarily performed by the company itself, may be in the "regular course of the business" of the company, even though not involving transportation of goods by truck. Cf. *Callihan v. Montgomery, supra*, distinguishing emergency repair of machinery from ordinary maintenance operations. See also, *Butera v. Western Ice & Utilities Co.*, 140 Pa. Super. 329, 14 A.2d 219 (1940). However, the Court of Appeals was content to classify Ormsbee as an employee in "regular course" by simply stating that he was engaged in the transportation of goods.

In the instant case, it appears that even the ordinary repair functions performed on equipment leased from Fidler and others was handled for respondent by independent contracting garagemen, rather than as a routine supplementary function of the respondent's business. Thus respondent did not do even this kind of work *regularly*. Be that as it may, the testimony shows how far removed from "ordinary" or "normal" was the transportation of Ormsbee in the emergency.

Ormsbee's role arose out of an emergency due to a week-long ordeal in covering the distance of a day's

journey. Ormsbee was engaged by an underling who was under strict orders that he was to have "no riders" with him at any time. The respondent and Fidler did not normally operate trucks with employees whose functions were those which Ormsbee was to provide. Respondent itself was to insist throughout the trial that, in relation to its operation, Ormsbee's role was so far from normal or routine that he was a trespasser. Only the extraordinary course of events justified the emergency engagement of Ormsbee to perform unusual functions in respondent's interests. The inference is that in respondent's normal operation, it neither provided roving mechanics, riding assistants, nor \$25-a-trip short-haul companions.

If presented with the question, the jury might well have concluded that Ormsbee was not engaged in the transportation of goods, and was not otherwise engaged in what would be considered a "normal operation" of respondent. The jury could have adhered to its view that the very abnormality of the operation and situation at hand meant that Ormsbee was not a trespasser on the truck, but had a business purpose to perform. At the same time the jury could have found that Ormsbee's role in respondent's affairs was not that of an employee in the "regular course" of the latter's business.

The question of employment by respondent, rather than by Fidler or Schroyer, and the question of whether this employment was in the "regular course" of respondent's business, involve a weighing of the facts and the inferences from the facts. While Pennsylvania precedents in other factual situations do not provide significant guidance, a few cases should be examined. The Court of Appeals relied heavily on *Persing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). There the hauling away of a stalled trolley was held



to be in the regular course of business of the trolley company. The hiring of a tractor and driver to perform the job was far from extraordinary, because the same tractor and driver had been hired only thirty days before for the same purpose.

The Pennsylvania Supreme Court has held more recently, in *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A. 2d 546 (1939), that the emergency employment of a passerby to help remove another employee of an electric power company, when he had become entangled in the power lines, was not in the "regular course" of the defendant's business. Therefore, a suit for damages would lie when the passerby, who had become an emergency employee, was injured by the carelessness of another employee of the defendant. The function of providing electric power could not go forward until the man was removed, because pending his being extricated the power lines had to be shut off. But the Court thought the service rendered was not "regular" because rendered "under an abnormal, unexpected and accidental circumstance." 336 Pa. at 507, 9 A. 2d at 549.

In view of *Vescio*, a jury determination that Ormsbee was not engaged in the "regular course" of respondent's business would have been reasonable. *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951), points to the same conclusion. This recent decision by the Colorado Supreme Court was reached under a statute construed identically to the Pennsylvania courts' construction of the "regular course" provision. In the *Heckman* case a truck en route on the highway caught fire. A gasoline station attendant, whose assistance was sought, boarded the truck to help put out the fire. While the Court held the attendant an emergency employee of the trucker, the employment was not in the



“normal operations constituting the regular business of the employer.” 124 Colo. at 509, 238 P. 2d at 860.

In summary, the fact question as to Ormsbee's status properly belonged with the jury. The Court of Appeals did not consider whether there was any reasonable basis for a jury determination in favor of petitioner on this point, because the Court simply followed State practice reserving the issue to the court.

4. The second question presented is whether this Court should direct a reinstatement of the jury verdict, or whether a retrial is necessary. This question will face the Court if certiorari is granted. It is discussed here in the event that the Court wishes to consider summary reversal.

Respondent is relying on the Workmen's Compensation Act in order to defeat petitioner's cause of action. If under the *Byrd* case the issue upon which respondent relies was one for the jury to determine, then respondent should have requested that the jury be charged on the question. It is respondent who is objecting to the jury verdict for petitioner. It is respondent who is insisting that petitioner's cause of action should be dismissed because the remedy under the Workmen's Compensation Act is exclusive. Patently, since petitioner was not urging the dismissal of his own cause of action, there was no necessity for petitioner to see to it that the jury was instructed as to the circumstances under which his cause of action might fail.

Rule 51 of the Federal Rules of Civil Procedure provides for the filing of written requests for instructions to the jury. The Rule further provides:

“No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its ver-

dict, stating distinctly the matter to which he objects and the grounds of his objection."

While respondent entered a general objection to the charge by the judge, and an objection to the failure of the court to instruct on those of its special requests which had been rejected (R. 197a), respondent neither requested the court, nor objected to its failure, to charge the jury as to the circumstances under which the Workmen's Compensation Act would apply so as to defeat the cause of action. Respondent was content to ask for a binding instruction in its Request No. 7. This Request did not even advise the jury that only those employees engaged in the regular course of respondent's business were covered by workmen's compensation. The Request rather was specifically tailored to withdraw from the jury not only the question of "regular course of the business," but also the question of whose employee Ormsbee was intended to be.

Failing to obtain the binding instruction which it requested, respondent did not care to have the issue submitted to the jury. When the trial court asked counsel if there was anything further which they desired to have added to the charge, respondent's counsel requested additional instructions in connection with contributory negligence, and after these were given, he specifically stated that there was nothing further on which he desired to have the jury charged (R. 195a-196a).

The record does not show why the respondent did not ask for instructions to the jury on the "employee" issue under the Act. Perhaps respondent did not object to the omission in the charge because it assumed, along with the trial court, that under Pennsylvania practice

the issue was solely one for the court, even though the court be federal. On the other hand, respondent's strategy was to center the jury's entire attention on the trespasser issue, which was its principal line of defense. It may, therefore, not have desired to have the jury instructed that Ormsbee might be an unusual type of employee who was not even covered by workmen's compensation. Such an instruction might have made Ormsbee look less like a trespasser in the eyes of the jury. Respondent, therefore, could well have considered it advantageous from its point of view not to have its secondary position—that the Workmen's Compensation Act controlled—submitted to the jury, except upon a binding instruction.

It is of course not material as to why respondent decided to forego its privilege of requesting jury instructions. It does not matter whether it mistook the law, or took a calculated strategic risk. It has long been settled that parties who fail to request charges, for whatever reasons may appeal to them, cannot later impose upon the court and the other party the burden of retrial.

Thus this Court has held, in an opinion by Mr. Justice Holmes, that where a binding instruction was requested, which was properly denied, and which was not followed by a request for submittal of the issue to the jury on proper instructions, no claim of error can be made because of the failure of the court to instruct the jury. *Louisville & Nashville R. R. Co. v. Parker*, 242 U.S. 13. The *Louisville* case involved a damage action which would lie only if plaintiff's employment was in intrastate commerce. The defendant asked for a directed verdict that the plaintiff was engaged in interstate commerce, and this request was denied. De-

fendant did not ask for the opportunity to have the issue submitted to the jury, possibly because the judge assumed throughout that intrastate commerce alone was involved. As Mr. Justice Holmes stated, at p. 15:

"It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand."

In fairness to the trial court and the other party, an erroneous charge on the law, or an omission from the charge, must be specifically called to the trial court's attention. If this is not done, the complaining party cannot later contest the jury verdict. *Palmer v. Hoffman*, 318 U.S. 109, 119; *Pennsylvania R. R. Co. v. Minds*, 250 U.S. 368, 375. Where there is no request for a charge, nor objection to the charge as given, the verdict should stand in the interest of ending litigation. *United States v. Atkinson*, 297 U.S. 157, 159; *Humes v. United States*, 170 U.S. 210; *Texas & Pacific Railway v. Volk*, 151 U.S. 73, 78.

Consequently, if certiorari is granted, and the judgment below is reversed, we believe that this Court should make it clear that the jury verdict should be reinstated, and that there is no necessity for a new trial. It is respectfully pointed out that the problem as to the nature of the mandate that should issue here is different from that in the *Byrd* case. In the *Byrd* case, petitioner, before completing his case, induced the trial court to strike respondent's defense based on the Workmen's Compensation Act. The trial court gave respondent an exception to the striking of its defense. Thus petitioner effectively prevented any submittal of



the issue to the jury.<sup>10</sup> With the record on the issue incomplete, and the respondent's defense stricken, there was no issue on which the jury could have been instructed. In the instant case this procedural situation did not prevail. All of the testimony was taken. The trial court made no determination on its own of the issue of workmen's compensation prior to the submittal of the case to the jury. Respondent thus was at all times free to seek a jury decision on this issue, as well as on any of the other issues upon which it wished to rely in persuading the jury to find for it.

In short, if this Court holds in the instant case that under the *Byrd* precedent the employment status of Ormsbee was one for the jury to decide, then the jury verdict must stand, since respondent cannot demand another chance before another jury to request appropriate instructions. Respondent should not gain a fresh opportunity before another jury to retry all the issues in this case, simply because it failed to ask for a jury charge on one issue. Such a *seriatim* approach would be burdensome to the litigants and a mockery of that sound judicial administration which is reflected in Rule 51 and the cases cited.

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<sup>10</sup> As this Court stated in its opinion in *Byrd*: "His [petitioner's] motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence." 356 U.S. at 532.



**CONCLUSION**

For the foregoing reasons the petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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OCTOBER, 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

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No. 12,518

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JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF  
NORMAN ORMSBEE, JR., DECEASED,

v.

AETNA FREIGHT LINES, INC., *Appellant.*

---

Appeal From the United States District Court for the  
Western District of Pennsylvania

---

Argued May 8, 1958

Before MARIS, GOODRICH and HASTIE, *Circuit Judges*

---

OPINION OF THE COURT

(Filed July 17, 1958)

By GOODRICH, *Circuit Judge*.

This is an appeal from the District Court for the Western District of Pennsylvania upon a judgment entered in a death by wrongful act case in favor of the administrator of Norman Ormsbee, Jr. The recovery was based on the alleged negligence of the defendant and there was also a finding by the jury that the defendant was guilty of "wanton conduct." The defendant attacks the verdict and judg-

ment on several grounds. The case is in federal court by diversity only and we look to the relevant Pennsylvania decisions.

The first question involves points of tort and agency law. The driver of the truck which was leased to the defendant, Aetna Freight Lines, Inc., had been encountering difficulties while enroute to Midland, Pennsylvania. A day or two prior to the accident there had been brake trouble which defendant's superintendent at Buffalo had endeavored to adjust. On the afternoon of the day in question the driver, Schroyer, stopped at Jones's Tavern at Waterford, Erie County, Pennsylvania. There he complained to the proprietor that he was having trouble with his brakes. Shortly thereafter the decedent, Ormsbee, and a man named Herbert Brown, entered the tavern. Schroyer offered Brown \$25.00 if he would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Ormsbee to accompany him and he agreed to for the price of \$25.00. The two men got into the tractor. This was the last time they were seen alive. Later that evening state police received a call and in answer thereto found the tractor-trailer off the highway over an embankment and both men dead. This is all the evidence we have except further details of the difficulties which the driver had had with this truck in the earlier part of his trip and the results of a post accident investigation.

The jury was given forthright interrogatories on this phase of the case. They are, with the answers thereto, as follows:

1. "Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?" Answer: "Yes."
2. "Was the defendant Aetna Freight Lines, Inc. negligent in the maintenance of the equipment or in the operation of the vehicle by the driver Charles Schroyer, either or both, which negligence was the proximate cause of the death of Norman Ormsbee, Jr.?" Answer: "Yes."

3. "Do you find that the braking equipment upon the vehicle in question, considering its size and load and road conditions prevailing, was in proper working order on March 20, 1956?" Answer: "No."

The answer to the first question is attacked by the defendant as being based on insufficient evidence.

The rule of law governing the situation is not so difficult. It is stated in the Restatement as follows:

"If a servant is authorized or apparently authorized to invite persons upon the vehicle . . . of the master, a person so invited is a guest of the master and if the entry is for business purposes, he is a business visitor." 1 RESTATEMENT, AGENCY 2d § 242, com. b (Tent. Draft No. 4, 1956) (not in 1st ed.).

"Unless otherwise agreed, an agent is authorized to appoint another agent for the principal if:

"(d) an unforeseen contingency arises making it impracticable to communicate with the principal and making such an appointment reasonably necessary for the protection of the interests of the principal entrusted to the agent." 1 RESTATEMENT, AGENCY 2d § 79(d) (Tent. Draft No. 3, 1955) (same as in 1st ed.). See also Illustration 5 to this section (ill. 6 in the 1st ed.).

The Pennsylvania cases emphasize the necessity of the "emergency." See, e.g., *Jaeger v. Sidewater*, 366 Pa. 481, 77 A.2d 434 (1951); *Jacamino v. Harrison Motor Freight Co.*, 135 Pa. Super. 356, 5 A.2d 393 (1939).

Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done.

The jury's finding is a forthright answer to a forthright question. The trial judge who heard all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside.

The defendant strongly urges the proposition that if the evidence is sufficient to sustain the conclusion that there was an emergency situation to justify the conclusion that

Schroyer had authority to employ Ormsbee to assist him, then the Pennsylvania Workmen's Compensation Act will be the sole basis for recovery. In rejecting this contention, the trial judge relied upon *D'Alessandro v. Barfield*, 348 Pa. 328, 35 A.2d 412 (1944). That was a case involving the "statutory employee" section of the statute, § 203, 77 PA. STAT. ANN. § 52 (Purdon 1952).<sup>1</sup> The Pennsylvania court said that § 203 was not involved, since the accident had occurred outside the employer's premises. There had been a judgment for the plaintiff in the trial court and the affirmance let this stand, the court saying that the "sole question" for its consideration was whether § 203 applied.

But *D'Alessandro* does not settle the argument of the defendant. It points out the definition of "employee" in § 104 of the statute<sup>2</sup> which includes "All natural persons, who perform services for another for a valuable consideration, *exclusive of persons whose employment is casual in character, and not in the regular course of business of the employer.* . . ." (Emphasis added.)

It is the exclusion part of the paragraph with which we are here concerned. Defendant concedes that the employment of Ormsbee was "casual," a correct concession as the discussion and authorities cited in *Skinner* will show.<sup>3</sup> But to be outside the coverage of the act, the employment must both be casual and not in the regular course of business. The Pennsylvania Supreme Court has said that both conditions must be met. *Pershing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928), is right in point. See also, *Booth v. Freer*, 133 Pa. Super. 594, 3 A.2d 205 (1938); *Sones v. Thompson Furniture Co.*, 163 Pa. Super. 392, 62 A.2d 116 (1948). "The regular course of business means an ordinary operation which may be required to carry out the master's work," said the court in the *Persing* case.

<sup>1</sup> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

<sup>2</sup> 77 PA. STAT. ANN. § 22 (Purdon 1952).

<sup>3</sup> 1 SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW 100-10 (4th ed. 1948, Supp. 1958).



This question, Skinner declares is "a question of law, and open to review."<sup>4</sup> We cannot escape the conclusion that the finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all.

Facts in the various cases applying the phrase vary widely, as one would expect. We are helped by the statement of principle in *Callihan v. Montgomery*, 272 Pa. 56, 72, 115 Atl. 889, 895, "The Legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance, and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ."

That, we think, is this case. The other matters raised do not require separate discussion.

The judgment of the district court will be reversed.

#### JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest:

HARRIET G. HUMPHRYS,  
Chief Deputy Clerk.

JULY 17, 1958

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<sup>4</sup> *Id.* at 100 & n. 90. See, e.g., *Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953).

## APPENDIX B

1. The United States Constitution, Amendment VII, provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Rule 51 of the Federal Rules of Civil Procedure provides:

### "INSTRUCTIONS TO JURY: OBJECTION

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

3. Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22, provides:

"The term 'employee', as used in this act is declared to be synonymous with servant, and includes—

"All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer. Every executive officer of a corporation elected or ap-

pointed in accordance with the charter and by-laws of the corporation, except elected officers of the Commonwealth or any of its political subdivisions, shall be an employe of the corporation."

Section 203 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 52, provides:

"An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

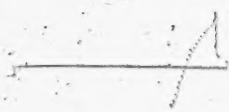
Section 302(b) of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 462, provides:

"After December thirty-first, one thousand nine hundred and fifteen, ~~an employer who permits the~~ entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, unless the employer shall post in a conspicuous place, upon the premises where the laborer's or assistant's work is done, a notice of his intention not to pay such compensation, and unless there be filed with the department within ten days thereafter, a true copy of such notice, together with proof of the posting of the same, setting forth upon oath or affirmation the time, place, and manner of such posting; and after December thirty-first, one thousand nine hundred and fifteen, any such laborer or assistant who shall enter upon premises occupied by or under control of such employer, for the purpose of doing such work, shall be conclusively presumed to have agreed to accept the compensation provided in article three, in lieu of his right of action under article two, unless he shall have given notice in writing to the employer, at

the time of entering upon such employer's premises for the purpose of doing his work, of his intention not to accept such compensation, and unless within ten days thereafter, there shall have been filed with the department a true copy of such notice, accompanied by proof of service thereof upon such employer, setting forth under oath or affirmation the time, place, and manner of such service. And in such cases, where article three binds such employer and such laborer or assistant, it shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed."

Section 427 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 872, provides:

"Any party may appeal from any action of the board on matters of the law to the court of common pleas of the county in which the accident occurred or of the county in which the adverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county of this Commonwealth: Provided, That no such appeal shall be taken to the court of common pleas of Allegheny County, but in Allegheny County all such appeals shall be taken to the county court of Allegheny County, which shall have exclusive jurisdiction of such appeals."





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**SUPREME COURT. U. S.**

No. 439

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# Supreme Court of the United States

October Term, 1958

JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,  
*Petitioner,*

vs.

AETNA FREIGHT LINES, INC.,  
*Respondent.*

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT**

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November, 1958.

# INDEX.

	PAGE
Opinions Below .....	1
Jurisdiction .....	1
Question Involved .....	2
Constitutional Provision and Statutes Involved ....	2
Statement .....	2
Reasons Why the Writ Should be Denied .....	4
Conclusion .....	18

## CITATIONS.

### CASES:

Byrd v. Blue Ridge Rural Electric Corporation, Inc., 356 U. S. 525 (1958) .....	10, 15
Herdman v. Pennsylvania Railroad Co., 352 U. S. 518 (1957) .....	15
Jaeger v. Sidewater, 366 Pa. 481, 77 A. 2d 434 (1951) .....	8
Persing v. Citizens' Traction Co., 294 Pa. 230, 144 Atl. 97 (1928) .....	13
Woods v. Interstate Realty Co., 337 U. S. 530 (1949)	14

### CONSTITUTIONAL PROVISION AND STATUTES:

Section 104, Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 22 .....	2
Section 203, Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 52 .....	2
United States Constitution, Amendment VII .....	2, 10
28 U. S. C. Sec. 1254 (1) .....	2

### MISCELLANEOUS:

1 Restatement, Agency, 2d, Sec. 242, Com. b (Tenta- tive Draft No. 4, 1956) .....	12
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# Supreme Court of the United States

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No. 439

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JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,

*Petitioner,*

vs.

AETNA FREIGHT LINES, INC.,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

---

## BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the Petition for Writ of Certiorari presented by Petitioner to review a judgment of the United States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the Western District of Pennsylvania be denied.

### Opinions Below

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals is reported at 257 Fed. Rep. 2d 445.

### Jurisdiction

The judgment of the Court of Appeals was entered on July 17, 1958 (Petitioner's App. p. v). A petition for re-

hearing was denied on August 14, 1958. Petition for Writ of Certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

### **Question Involved**

Should the holding of the Court of Appeals that the jury's answer to the Special Interrogatory in favor of the Petitioner barred recovery in the Federal Court action, be reviewed by this Court on certiorari?

### **Constitutional Provision and Statutes Involved**

The Constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are in Pennsylvania Workmen's Compensation Act, Sections 104 and 203 (77 Purdon's Pa. Stat. Ann. Secs. 22, 52). The text of those provisions is set forth in Petitioner's Appendix at pages vi and vii.

### **Statement**

This was a negligence action brought in the Federal District Court on the basis of diversity jurisdiction. Petitioner, as administrator of the Estate of Norman Ormsbee, Jr., brought suit against Respondent alleging that the latter was responsible for the death of said decedent because of an accident which occurred on March 20, 1956 near Rochester, Pennsylvania.

Prior to that date, one Daniel Fidler, owner of the tractor-trailer had leased the equipment to Respondent for use in its regular business of transporting freight under a permit from the Interstate Commerce Commission. On or about March 13, 1956, Respondent's driver, Charles Schroyer, picked up a load of steel at Syracuse, New York, which

load was consigned to Crucible Steel Corp., at Midland, Pennsylvania. While enroute from Syracuse to Buffalo, Schroyer encountered tire trouble and also had had brake difficulty, which Respondent's superintendent at Buffalo had endeavored to adjust.

On the afternoon of March 20, 1956, Respondent's driver stopped at Jones' Tavern at Waterford, Erie County, Pennsylvania. There he talked to the tavern owner to whom he complained that he was having trouble with the brakes. A few minutes later, Petitioner's decedent and Herbert Brown entered the tavern. Schroyer offered Brown \$25 if Brown would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Petitioner's decedent to go on the trip for \$25.00, stating that he was having trouble with the brakes on the tractor and also on the trailer. Petitioner's decedent accepted the offer and the two got into the tractor. This was the last that they were seen alive. Later that evening, the Pennsylvania state police received a call and in response thereto found the tractor-trailer over an embankment along the highway about four and one-half miles east of Rochester, Pennsylvania, and both men dead.

Petitioner's entire theory throughout the trial was to prove the facts set forth above surrounding the circumstances under which Petitioner's decedent came to be on the tractor. Petitioner asked the Trial Judge to charge on these facts which Petitioner presented and to further charge that if the jury accepted Petitioner's testimony, then the jury could find that an emergency arose which necessitated Respondent's driver in engaging Petitioner's decedent to accompany him for the remainder of the trip to protect Respondent's interests. This the Trial Judge did



(R. 184a). In addition, the Trial Judge submitted special interrogatories, the first of which was exactly in accordance with Petitioner's theory as set forth immediately above. The jury answered this special interrogatory, saying, as Petitioner's theory was, that such an emergency had arisen and that the situation necessitated Respondent's driver in engaging Petitioner's decedent. The jury returned a verdict for Petitioner which the Trial Court refused to set aside. On appeal to the United States Court of Appeals for the Third Circuit, the Court, by Circuit Judge Goodrich, held that the special interrogatory was clear, and that the jury's answer thereto was clear and that such determination constituted Petitioner's decedent an employee under the substantive law of Pennsylvania. Therefore, the Court of Appeals held that under the jury's determination, Petitioner's sole remedy against Respondent was under the Pennsylvania Workmen's Compensation Act. The Petition for Writ of Certiorari seeks review of this decision.

### **Reasons Why the Writ Should be Denied**

Petitioner's entire position throughout the trial of this case was that the presence of Petitioner's decedent in Respondent's tractor was necessitated by an emergency situation which arose during the operation, by Respondent's driver, of the tractor-trailer. The record establishes this beyond all doubt and establishes that it was Petitioner who brought in the evidence of emergency; who brought in evidence of the payment of money to Petitioner's decedent; who argued that such evidence proved "employment" of Petitioner's decedent; and who presented that theory to the Trial Judge for charge.

The undisputed factual situation left Petitioner no alternative. Petitioner was well aware that not only Respond-

ent's Company rules and regulations but also the regulations of the Interstate Commerce Commission, which governed operations of Respondent's trucking equipment, forbade "riders" on such equipment. Petitioner also knew that under established Pennsylvania law, if Respondent's driver did permit a "rider" on the truck, such rider had the status of a trespasser as to Respondent, the only named defendant.

It was solely to escape the holding that Petitioner's decedent would be a trespasser as to Respondent that Petitioner sought to establish (and did establish to the jury's satisfaction) an emergency giving rise to an implied right in Respondent's driver to hire Petitioner's decedent in furtherance of Respondent's interests. There was no middle ground. If Petitioner's decedent were not a mere "rider" (therefore a trespasser as to Respondent), he had to be on the truck as an emergency employee of Respondent. Otherwise, as Judge Goodrich, speaking for the Court of Appeals, said in his opinion, 257 F. 2d 448: "If that was not what he was doing, he had no business riding with Schroyer at all."

Respondent did not raise the defense of emergency; did not present the testimony of an emergency; did not present the testimony relative to "employment". Here is the record:

1. Petitioner's first witness, after two state police officers had testified as to what they found at the scene of the accident, was Herbert L. Brown. It was Brown's direct examination that first brought into the case the circumstances surrounding Ormsbee's being on the tractor. *Petitioner* proved through Brown that Respondent's driver stated in the Tavern that he had been having trouble with the truck. Petitioner proved through Brown that Respond-

ent's driver offered \$25.00 to Brown to go along on the remainder of the trip. Petitioner's purpose in asking for this testimony is clearly set forth at R. 36a where, when Respondent's counsel objected to this hearsay testimony, Petitioner's counsel stated in open court:

"Your Honor, we frame this question in this manner *to show the intent, purpose and motive of Mr. Schroyer in offering employment to this man.* We realize it is hearsay, but it comes in under the—first of all, under the testimony of the man acting in the course of his employment, secondly under the *res gestae*, and thirdly, to show the intent, purpose and motive."

As shown, Petitioner produced this evidence to prove the employment of Petitioner's decedent by Respondent's driver.

2. Petitioner's witness who immediately followed Brown was Charles Jones, the owner of Jones' Tavern, where the offer of employment by Schroyer to Ormsbee took place and where that offer was accepted. Jones, on Petitioner's direct examination, proved that such an offer of \$25 was made by Respondent's driver to Petitioner's decedent and that it was accepted, and that the reason for the offer was that the driver was having trouble with the "brakes on the tractor, also the trailer" (R. 48a).

3. With respect to the testimony of these two Petitioner witnesses, Respondent, on cross examination, constantly sought to prove that if such an offer was made by Respondent's driver, it was only because said driver wanted to prove how much money he made on a trip. Petitioner's witnesses clearly refuted this theory of Respondent.

4. Petitioner proved the complaints of Respondent's driver concerning brake trouble, by his next witness, the Respondent's own Buffalo terminal superintendent. Thus, Petitioner continued to prove emergency which caused the employment of Ormsbee.

5. At the conclusion of Petitioner's case, Respondent moved for a compulsory nonsuit on the ground that Petitioner had not proven that Ormsbee was on the truck for any purpose of Respondent. Petitioner's counsel stated (R. 114a):

"The question is whether *our* evidence in this case develops an unforeseen contingency or an emergency arising.

\* \* \*

I think it is a legitimate inference, in view of the trouble he was having, he was fearful he was going to break down on the road, he needed somebody to give him help at that particular point."

(R. 115a)

"(Ormsbee was) To help in the case of a breakdown."

(R. 116a)

"You can understand for instance suppose the thing is wrecked, you have got a valuable load laying around a field in a storm, something like that, certainly a servant would have authority to engage a helper to help him protect, cover up with a tarpaulin.

\* \* \*

I think he (Schroyer) foresees that he is going to have a breakdown on the road, he wants somebody along to accompany him in that thing that appears certain in the light of what's been going on in the past."

(R. 117a)

"I think the jury can infer what he wants the farmer to do is go out and help with the cargo. I think in this case the jury can infer he (Schroyer) wants help in case of a breakdown."

6. At the conclusion of all the evidence by both sides, certain requests for instructions to the jury were sub-

mitted to the Trial Judge. In a conference in Chambers, the Court discussed these with counsel for both sides.

*Petitioner's* very first request for instructions was:

"An agent has implied authority to employ an assistant where an unforeseen contingency arises making it impracticable to communicate with the agent's principal, and making the appointment of an assistant reasonably necessary for the protection of the interests of the principal entrusted to the agent, and if you find such to be the fact in this case, then Norman Ormsbee, Jr. would not be a trespasser upon defendant's vehicle."

This request was based almost verbatim on the language of the Pennsylvania Supreme Court in *Jaeger v. Sidewater*, 366 Pa. 481, 77 A. 2d 434. Here again *Petitioner* was pursuing its constant course, held throughout the trial, that *Petitioner's* decedent was brought upon the tractor-trailer of Respondent through the implied authority to employ a helper vested in Respondent's driver under Pennsylvania law. This request the Court affirmed and read it to the jury as a correct statement (R. 189a).

7. The Court's charge also instructed the jury on *Petitioner's* theory of the case. At R. 183a and R. 184a the Court instructed the jury:

"Now as related to negligence, the Aetna Freight Lines, the defendant in this case, would not be responsible for want of care, for negligence, unless the decedent Mr. Ormsbee was in that truck with its permission, by its consent express or implied, and the law is that the driver can't give the consent, except in this case of emergency, and that is why this testimony brought out on the part of the plaintiff to indicate there was such an emergency there that authorized, they (*Petitioner*) think under the law, that would permit Mr. Schroyer to invite Mr. Ormsbee to complete the trip with him, but unless you find in this case that an emergency arose and it was such an emergency that Mr. Schroyer was unable to perform it



alone, that is his duties for the continuance of the trip, because of what has been brought out here, if you accept the proposition that the brakes were bad, and if that was the type of emergency then he would be privileged to take on this *assistant* Mr. Ormsbee.

\* \* \*

It is a rule universally recognized that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. It is upon the exception to this general rule which is quite as well settled as the general rule itself, *that the plaintiff relies in this case to establish the relation of master and servant under this evidence.* The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but you have to find an emergency on the road confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected *in the interests of the employer* (Respondent) that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him to complete the trip."

That portion of the charge laid down as factually, as emphatically and as clearly as possible the Petitioner's theory in this case. :

8. Petitioner's theory was then presented to the jury in the form of a Special Interrogatory which read (R. 184a-185a):

"Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests, that the driver Charles Schroyer engage the decedent Norman Ormsbee to accompany him for the remainder of the trip?"

It should be again noted that the only evidence of an unforeseen contingency (an emergency) was that presented by *Petitioner*.

It should also be noted that the Court's reading, in its charge, of this first Special Interrogatory to the jury immediately followed the quotation from the charge under point 7 immediately above, where the Court had discussed implied authority to establish the relation of master and servant. It is of extreme interest to note that after the Court read this Special Interrogatory to the jury (R. 185a), he then said:

"and the words there 'unforeseen contingency' mean the emergency I have just mentioned, the inability of Mr. Schröyer to cope with it alone. *If you think it reasonable that he (Schroyer) engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative.*"

With these clear instructions as to the creation of the master and servant relationship under the evidence in the case, and with this clearly worded Special Interrogatory before it, the jury answered "Yes" to it, thus finding that the master-servant relationship had been established by Petitioner.

It is therefore readily apparent that Petitioner's evidence and Petitioner's theory based on that evidence was submitted to the jury. The jury found that Petitioner's theory was correct. Yet, with all of the above in mind and firmly appearing in this record, Petitioner claims that he was denied a jury trial under the Seventh Amendment of the Constitution and under the authority of *Byrd v. Blue Ridge Rural Electric Corporation, Inc.*, 356 U. S. 525.

In the *Byrd* case, *supra*, a negligence action was brought in the District Court for the Western District of South Carolina, on the basis of diversity of citizenship. The Respondent in that case raised the affirmative defense that the Petitioner's only remedy against that Respondent was under the South Carolina Workmen's Compensation Act.

Petitioner did not, in any part of his case, introduce testimony attempting to rebut the affirmative defense. To have done so would have been anticipating a defense and undoubtedly would have been stopped by the Trial Judge. The Respondent, in its case, introduced evidence bearing on the affirmative defense. At the conclusion of the entire case, Petitioner moved the Court to strike the affirmative defense as not having been established under the law of South Carolina. This motion the Trial Court granted. Petitioner therefore did not introduce any rebuttal evidence to contradict the Respondent's evidence bearing on the affirmative defense. There was no need to—Petitioner's motion had been granted and the affirmative defense had been stricken. Petitioner then received a verdict from the jury. After motion for new trial and judgment *n. o. v.* were refused, Respondent appealed to the Court of Appeals which, upon making an independent examination of Respondent's evidence bearing on the affirmative defense, reversed, and held that, as a matter of law, under appellate decisions of the South Carolina Supreme Court, the affirmative defense had been established, and that Petitioner could not recover except under the South Carolina Workmen's Compensation Act. Upon certiorari being granted by this Court, it was held that a new trial was required because Petitioner had not been afforded an opportunity to rebut Respondent's evidence bearing on the affirmative defense and, then, the jury should decide the ultimate factual matters bearing thereon.

This Court also discussed the question of whether the practice in South Carolina, approved by the South Carolina Supreme Court, of having the courts of that state decide the factual issues of immunity without the aid of juries was binding upon Federal Courts to whom a like

immunity question came. This Court said that the federal system of separation of court from jury in deciding such factual questions would take precedence over the South Carolina practice. Because of that discussion, Petitioner here says that the jury was never permitted to decide the factual issue bearing on the status of Ormsbee. That is not so.

Respondent in this case did not raise the employment question and its consequences as an affirmative defense. Respondent's Answer to the Complaint (R. 9a and 10a) clearly shows that. Respondent did not introduce the question of emergency, of hiring, or of employment in the trial of the case—Petitioner did. Petitioner's evidence and Petitioner's theory of emergency plus hiring was presented to the jury in clear language by the Court's charge and by the use of Special Interrogatory Number 1. The jury found in favor of Petitioner's theory by its affirmative answer thereto.

Nor did the Court of Appeals for the Third Circuit make an independent examination of the record to see if the jury had properly decided the factual question concerning the status of Petitioner's decedent. Judge Goodrich, after discussing the Pennsylvania cases and 1 Restatement, Agency, 2d, Sec. 242, com. b (Tent. Draft No. 4, 1956) bearing on the question of implied right of an agent to appoint another agent for the principal, said, 257 F. 2d 447:

"Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done.

"The jury's finding is a forthright answer to a forthright question. The trial judge who heard all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside."

*Applying that factual determination by the jury to the law of Pennsylvania, as announced by the Pennsylvania Supreme Court in Persing v. Citizens' Traction Co., (1928) 294 Pa. 230, 144 Atl. 97, the Court of Appeals held that Petitioner's remedy was under the Pennsylvania Compensation Act. This in no way constituted a review of the testimony in order to decide the factual question contrary to the jury's finding. The Court accepted the jury's determination. The jury, not the Court of Appeals, determined Ormsbee's status. Petitioner says at page 20 of its Petition for the Writ that "the Court of Appeals did not consider whether there was any reasonable basis for a jury determination in favor of Petitioner on this point (status), because the Court simply followed State practice reserving the issue to the Court". That is exactly contrary to what Judge Goodrich decided and what he said. He and the other two eminent Judges of the Court of Appeals, Maris, J. and Hastie, J., specifically accepted the jury's determination of Ormsbee's status. They didn't examine the record to see if there was any reasonable inference to support the jury's answer to the Special Interrogatory because they adopted it. What more could Petitioner ask?*

Petitioner also contends that the Court of Appeals had no power to apply the Pennsylvania cases, and in particular *Persing v. Citizens' Traction Co., supra*, to the jury's factual determination. In particular, Petitioner claims that the question of whether Ormsbee was employed in the regular course of Respondent's business was for the jury. But, there was absolutely no dispute in this entire record on this point. Petitioner's own counsel stated (R. 114a) that the jury could infer that Respondent's driver, in the course of continuing his journey of delivering the



load of steel (certainly Respondent's regular business), was fearful of breaking down on the road and that he would need help at that particular point. Again at R. 115a, Petitioner's counsel flatly stated that Ormsbee was "to help in case of a breakdown". All of this Petitioner related to Respondent's business of transportation of goods and protection thereof in the event of breakdown of the delivery equipment. Judge Goodrich, at 257 F. 2d, 448, said it better than we can:

"We cannot escape the conclusion that the finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all."

In doing so, the Court of Appeals followed Pennsylvania law, and as the Court has said, "We ordinarily accept the determination of local law by the Court of Appeals." *Woods v. Interstate Realty Co.*, (1949) 337 U. S., 530.

Petitioner's position in this matter, as presented in its Petition to this Court, is extremely anomalous. Petitioner presented the status of Ormsbee to the jury. Petitioner was satisfied with the jury's determination. Petitioner was satisfied with the Trial Court's handling of the matter on the Motions for New Trial and Judgment *N. O. V.* Petitioner became dissatisfied when the Court of Appeals accepted the jury's determination and applied the Pennsylvania law. After the Court of Appeals handed down its decision, Petitioner sought rehearing on the sole ground that only the Workmen's Compensation Bureau of Pennsylvania had the power to determine the question of Ormsbee's status after the jury had already passed upon the factual issues as Petitioner had presented them. Now, Petitioner says the Court of Appeals had no power to ap-

ply Pennsylvania substantive law to the jury's determination, but that the jury should act on questions of law. We ask—just what power, under the Petitioner's theory, does the Court of Appeals have? Also, just what power does the Federal District Court have? Petitioner says that they have none—that the jury alone decides questions of fact and interprets the law. This is an amazing departure from the settled (certainly ever since common law and common law trial by jury was brought to this country) position and authority of judges. But *Byrd, supra*, calls for no such abandonment of the function of judges to a jury. *Byrd* merely teaches that even though state court practice may be that the Court, not the jury, can examine the disputed evidence and decide an issue under the law, such does not pertain in the Federal Court system. Here, even if Pennsylvania state court practice were to that same effect, this Trial Court and this Court of Appeals did not take the question from the jury. They took the jury's determination of the factual issue and applied the law. We know of no case that has ever held that such is not the function of the Court.

Even in the field of Federal Employer Liability Cases, this Court has specifically and very recently recognized the right of the Federal Trial Court or the Court of Appeals to examine the evidence in the record to determine, as a matter of law, whether any evidence of, or even any inference of, negligence on the part of a defendant existed. If not, this Court agreed that the Trial Court or the Court of Appeals could enter a directed verdict for the defendant. Such procedure didn't deprive a plaintiff of a jury determination of his case. *Herdman v. Pennsylvania Railroad Co.*, (1957) 352 U. S. 518. *A fortiori*, if a plaintiff's case is tried on a theory of master-servant relationship, and it is submitted to jury on that basis, and the jury finds such a

relationship, and the substantive law of a state then holds that the remedy is not under common law but under a state statute, there has been no denial of jury trial—on the contrary, full jury trial was had!

Lastly, Petitioner contends that Respondent failed to call the Trial Judge's attention to an omission in the charge, and that therefore Respondent cannot later complain and contest the jury's verdict. But the Trial Judge did not, in this case, omit anything relative to the determination of the factual issue of status of Ormsbee in his charge to the jury. If it need be said again after all the times we have said it heretofore, Respondent was not the one who raised the issue of Ormsbee's status. Petitioner did. Petitioner set out to prove and did prove to the jury's satisfaction that Ormsbee was hired by Respondent's driver while the latter was within the scope of his employment. If not, then all of the testimony adduced by Petitioner relative to Schroyer's statements at Jones' Tavern on March 22, 1956, was clearly inadmissible as the rankest of hearsay and not admissible against Respondent, the only defendant, unless the agent (Schroyer) was within the scope of his employment, as Respondent's employee, at the time. As a matter of fact, that was the reason that Petitioner's counsel advanced to get such hearsay into this record. See R. 36a. Respondent tried to keep this hearsay evidence out. Petitioner fought for it and got it in. Petitioner's own case raised the issue of employment. This was not by happenstance but by design, as we have shown above. If Petitioner felt that additional instructions were necessary to clarify exactly what Petitioner was trying to prove, Petitioner could have and should have requested such additional instructions and additional Special Interrogatories. We can see that if Respondent had been the one to introduce the status question in this record,

and if Respondent had been the one proving the emergency and the hiring of Ormsbee, Respondent may have been required to ask the Court for additional instructions. But, Respondent was not proving the point here. Petitioner was. Petitioner proved the existence of an emergency. Petitioner proved the offer and acceptance of compensation. Petitioner proved that the length of employment was casual—in this case, for the balance of one trip. Petitioner proved that all this took place in the regular business of Respondent, the transportation of goods by truck.

In short, the Petitioner proved in his own case that there could be no other result than that reached by the able Court of Appeals. Yes, litigation must at some time end. Petitioner is not entitled to a new trial nor to reinstatement of his verdict when he sought such verdict on his own theory and his own theory prevailed with the jury. If, because Petitioner's theory did prevail, the substantive law of Pennsylvania holds that he is out of Court, he should not be permitted to alter his theory and seek another trial at the hands of another jury. Such truly would be a mockery of judicial administration.

**CONCLUSION**

For the foregoing reasons, the Respondent prays that the Writ of Certiorari be denied.

Respectfully submitted,

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November, 1958.



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No. 439

JAMES R. BROWNING, Clerk

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# Supreme Court of the United States

OCTOBER TERM, 1958

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JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

v.

~~AETNA FREIGHT LINES, INC., Respondent~~

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY BRIEF FOR PETITIONER

---

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## REPLY BRIEF FOR PETITIONER

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### I

In order to focus on the essentials, we believe it is necessary to state the key points that are not controverted by respondent's Brief in Opposition:

1. Respondent does not deny that under Pennsylvania practice the applicability of the Workmen's Compensation Act is reserved to the court. The applicability of the Act depends upon the factual determination of whether Ormsbee was an "employee" who was employed in the "regular course of the business" of the respondent.

2. Respondent does not contest that the Federal District Court in the instant case so viewed the Pennsyl-

vania law. The trial judge made it abundantly clear that he proposed to reserve the issue of whether petitioner's decedent was an employee *within the meaning of the Workmen's Compensation Act* for decision by the court. The experienced trial judge stated to counsel before submitting the key interrogatory to the jury:

"[Interrogatory] Number 1 I think is directed at one of the issues here. I have said, you see, you notice there *I refrain from saying just what his status is. I don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law.*" (R. 169a) [Emphasis supplied.]

3. Respondent never asserts that the jury was asked to find whether petitioner's decedent was engaged in the "regular course of the business" of the respondent. Indeed, respondent cannot maintain that either this statutory language, or any equivalent language, was ever presented, at its request or otherwise, to the hearing of the jury. Certainly if respondent wanted the jury to determine the factual question of the applicability of the Workmen's Compensation Act, so as to defeat the petitioner's cause of action, it would have asked for instructions on the meaning of "regular course of the business." That concept, as we have seen, is confined to an "ordinary" or "normal" function, and does not include all business activities engaged in by a corporation. The fact of the matter is that the respondent wanted the court to decide the question, and not the jury.

4. Respondent makes no claim that any further instruction to the jury was sought after its Request No. 7 for a binding instruction on the applicability of the Workmen's Compensation Act was refused. (See Peti-

tion, pp. 9, 21.) While respondent consistently endeavored at all times thereafter to have petitioner's cause of action dismissed on the ground that the Workmen's Compensation Act provided the exclusive remedy, respondent made no further effort to have the jury instructed so that the latter, and not the court, could decide the issue. Indeed in its Brief in Opposition respondent is so interested in detaching itself from any participation in the trial that it even fails to note that it made Request No. 7 specifically addressed to the Workmen's Compensation issue. Yet the failure to give the charge was relied on by respondent in seeking a new trial. (R. 203a).

## II

It is at least clear that respondent is not challenging any of the foregoing points. The key to respondent's Brief in Opposition appears at p. 13, when it states:

"The Court [of Appeals] accepted the jury's determination. The jury, not the Court of Appeals, determined Ormsbee's status."

The fallacy of this approach can best be seen by asking the question: What was the jury's determination that the Court of Appeals accepted?

As we have seen, the jury never considered the question of whether Ormsbee was an employee in the "regular course of the business" of the respondent. That was one of the key tests for the applicability of the Workmen's Compensation Act, but the jury was not asked to consider it. Nor did the jury consider whether Ormsbee, who was engaged during an emergency, was the employee of Fidler or Schroyer, rather than respondent. In neither of these situations would the Workmen's Compensation Act have barred recovery

against respondent; moreover, Ormsbee would not have been a trespasser. Through Interrogatory No. 1, the jury was merely being asked to determine whether Ormsbee was a trespasser, or whether he had a legitimate reason in an emergency for being on the truck. As the trial court stated:

"Although at pretrial the status of decedent's relationship with defendant was raised and discussed, the interrogatory to the jury was not so phrased as to require the jury to determine whether decedent was an employee of Aetna." (R. 210a).

And certainly it was not so phrased as to require a determination as to whether Ormsbee was an employee of respondent in the regular course of its business.

Respondent, at p. 5, erroneously states:

"There was no middle ground. If Petitioner's decedent were not a mere 'rider' (therefore a trespasser as to Respondent), he had to be on the truck as an emergency employee of Respondent."

Ormsbee could indeed have been an emergency employee of respondent, but still not engaged in the "regular course of the business" of the respondent. And, as has been shown, Ormsbee could have been on the truck as an agent or employee of someone other than respondent. But if respondent means to imply at this late date that an "emergency employee", and an employee in the "regular course" of respondent's business, are synonymous terms, this is directly contrary to Pennsylvania law, and not supported by the Court of Appeals in the instant case. *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939).

In short, the trial judge, who was in doubt as to whether or not Ormsbee was a trespasser, obtained by



Interrogatory No. 1 a specific answer from the jury on this question. Since respondent did not seek a jury answer with respect to its defense under the Workmen's Compensation Act, which it raised as early as pretrial, no jury determination of this question was made. And a jury verdict for petitioner cannot be upset on the basis of this defense without now depriving petitioner of its right to a jury decision.

When respondent, at p. 13 of its Brief, asserts that "the Court [of Appeals] accepted the jury's determination", it must be appreciated that the *jury* determination which the Court accepted was that petitioner's decedent was not a trespasser. At that point, the Court of Appeals considered respondent's defense that the Workmen's Compensation Act applied. *The Court of Appeals fully realized that this question had not been submitted to the jury*, but specifically relying upon SKINNER, a secondary treatise on the Pennsylvania law, concluded that it was authorized to decide the question under state practice. Indeed, if as respondent now asserts, the Court of Appeals was merely accepting a jury finding, why did it find it necessary to rely on SKINNER?

It is not necessary for petitioner to challenge the inference then drawn by the Court of Appeals that Ormsbee was engaged in the regular course of the business of the respondent, namely, transportation of goods by truck, or he had no business being on the truck at all. While that conclusion is erroneous on its face, the point is that this inference from the evidence is one that should have been considered by the jury based on a proper instruction. And the further point is that respondent, although relying upon this defense, did not seek the necessary jury determination to permit it to

prevail under *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525.

Since respondent obviously realizes that there is a gap between any jury finding of emergency employment, and a finding that Ormsbee was engaged in the regular course of respondent's business, it lamely asserts, at p. 13, that somehow this issue did not get to the jury because there was no dispute in the record on the point, and in fact that the point was mysteriously conceded. No matter how the record is read, petitioner made no such concession, either in oral argument or otherwise, and this is the first time that such a contention has even been advanced.

In fact, Ormsbee was engaged under most unusual circumstances to perform a most unusual role, and every inference is that his employment was both casual and other than in the "normal" or "ordinary" course of respondent's business. At the very least, a jury could have so found. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, *supra*, reserves that finding in a federal court to the jury. It is too late now for respondent to seek a jury determination, and it is contrary to *Byrd* to substitute a finding by the Court of Appeals.

**CONCLUSION**

For the reasons stated here and in the Petition for Certiorari, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
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## BRIEF FOR THE PETITIONER

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# INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	1
Questions Presented .....	2
Constitutional Provision and Statutes Involved .....	3
Statement .....	3
Summary of Argument .....	13
Argument .....	16
Conclusion .....	39
Appendix .....	i

## CITATIONS

### Cases:

<i>Bailey v. Central Vermont Ry.</i> , 319 U.S. 350, 353.....	17
<i>Barnett v. Bowser</i> , 176 Pa. Super. 17, 106 A.2d 457 (1954) ..	19
<i>Blake v. Wilson</i> , 268 Pa. 469, 112 Atl. 126 (1920).....	19, 25
<i>Boehm v. Commissioner of Internal Revenue</i> , 326 U. S. 287, 293 .....	17
<i>Boyd v. Philmont Country Club</i> , 129 Pa. Super. 135, 195 Atl. 156 (1937).....	19
<i>Butrin v. Manion Steel Barrel Co.</i> , 361 Pa. 166, 63 A.2d 345 (1949).....	20
<i>Byrd v. Blue Ridge Rural Electric Cooperative, Inc.</i> , 356 U.S. 525 .....	2, 13, 16, 21, 36, 37
<i>Cafasso v. Pennsylvania R. Co.</i> , 169 F.2d 451 (3d Cir, 1948) .....	35
<i>Callihan v. Montgomery</i> , 272 Pa. 56, 115 Atl. 889 (1922), 14, 19, 25, 26	
<i>Cardillo v. Liberty Mutual Co.</i> , 330 U.S. 469.....	17, 19
<i>Ciccocioppo v. Rocco</i> , 172 Pa. Super. 315, 94 A.2d 77 (1953) .....	19, 25
<i>D'Alessandro v. Barfield</i> , 348 Pa. 328, 35 A.2d 412 (1944) .....	22
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64.....	7, 16, 20
<i>Gearhart v. Summit Fast Freight, Inc.</i> , 167 Pa. Super. 481, 75 A.2d 606 (1950) .....	22
<i>Heckman v. Warren</i> , 124 Colo. 497, 238 P.2d 854 (1951)....	28



## Cases—Continued

	Page
<i>Herron v. Southern Pacific Co.</i> , 283 U.S. 91.....	21
<i>Humes v. United States</i> , 170 U.S. 210.....	35
<i>Kimble v. Mackintosh Hemphill Co.</i> , 359 Pa. 461, 59 A.2d 68 (1948) .....	22, 24
<i>Lebeck v. William A. Jarvis, Inc.</i> , 250 F.2d 285, 288 (3d Cir. 1957) .....	38
<i>Louisville &amp; Nashville R.R. Co. v. Parker</i> , 242 U.S. 13.....	15, 34
<i>Lumberman's Mutual Casualty Co. v. Elbert</i> , 348 U.S. 48, 53, fn. 5 .....	16
<i>Miller v. Farmers Nat. Bank</i> , 152 Pa. Super. 405, 33 A.2d 646 (1943) .....	26
<i>Myers v. Reading Co.</i> , 331 U.S. 477.....	17
<i>O'Leary v. Brown-Pacific-Maxon, Inc.</i> , 340 U.S. 504.....	17
<i>Palmer v. Hoffman</i> , 318 U.S. 109, 119.....	15, 32, 35
<i>Passarelli v. Monacelli</i> , 121 Pa. Super. 32, 183 Atl. 65 (1936) .....	19
<i>Pennsylvania R.R. Co. v. Minds</i> , 250 U.S. 368, 375.....	35
<i>Persing v. Citizens' Traction Co.</i> , 294 Pa. 230, 144 Atl. 97 (1928) .....	20, 27
<i>Scott v. Baltimore &amp; O. R. Co.</i> , 151 F.2d 61, 65 (3d Cir. 1945) .....	38
<i>Senko v. LaCrosse Dredging Co.</i> , 352 U.S. 370.....	17
<i>Tennant v. Peoria &amp; P. U. Ry. Co.</i> , 321 U.S. 29.....	17
<i>Texas &amp; Pacific Railway v. Volk</i> , 151 U.S. 73, 78; .....	35
<i>Thomas v. Conemaugh &amp; Black Lick R. R. Co.</i> , 234 F.2d 429, 434 (3d Cir. 1956) .....	39
<i>United States v. Atkinson</i> , 297 U.S. 157, 159.....	15, 35, 36
<i>Vescio v. Pennsylvania Electric Co.</i> , 336 Pa. 502, 9 A.2d 546 (1939) .....	15, 20, 28
<i>Walters v. Kaufmann Department Stores, Inc.</i> , 334 Pa. 233, 5 A.2d 559 (1939) .....	20
<i>Wilson v. Nu-Car Carriers, Inc.</i> , 158 F.Supp. 127, 135 (M.D. Pa. 1958), <i>aff'd.</i> , 256 F.2d 332 (3d Cir. 1958) .....	39

## Constitutional Provision and Statutes:

United States Constitution, Amendment VII.....	3, 16, i
28 U.S.C. § 1254(1) .....	2
Rule 51 of the Federal Rules of Civil Procedure.....	3, 15, 31, i

**Constitutional Provision and Statutes—Continued**

	Page
Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22.....	3, 18, 24, i
Section 203 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 52.....	3, 11, ii
Section 302(b) of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 462.....	3, ii
Section 427 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 872.....	3, 19, iii

**Miscellaneous:**

SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW (4th ed. 1947) .....	12, 18, 19
RESTATEMENT, AGENCY 2d §§ 79, 242.....	23, 24
RESTATEMENT, TORTS § 332 .....	24



# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 439

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

*v.*

AETNA FREIGHT LINES, INC., *Respondent*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals (R. 228) is reported at 257 F. 2d 445.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1958 (R. 233). A timely petition for rehearing was denied on August 14, 1958 (R. 234). The

petition for writ of certiorari was filed on October 13, 1958, and was granted on January 12, 1959 (R. 236). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

The Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 1 *et seq.*, provides, in the absence of an express election to the contrary, an exclusive administrative remedy for the death of an "employee" who is not "casual" and whose employment is "in the regular course of the business of the employer." As a matter of State court practice, the "employee" status is held to be a "question of law."

This is a federal diversity case brought by petitioner for wrongful death. Respondent, at the conclusion of the taking of testimony, made no request for the submittal of the issue of "employee" status for resolution by the jury; nor did it object to the court's failure to instruct on this issue. A jury verdict was returned for petitioner. The District Court thereafter denied motions to set aside the jury's verdict. The Court of Appeals, adhering to State practice as to the court's function, reversed, ruling that the Workmen's Compensation Act applied, and the suit for wrongful death must be dismissed. The Court held that petitioner's decedent was respondent's emergency "employee", and his employment was in the "regular course" of respondent's business. Thus there is presented the same basic question as in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525. That question is:



1. In a diversity case in a federal court, is the issue of whether petitioner's decedent was an employee, and whether his employment was in the regular course of respondent's business within the meaning of the Pennsylvania Workmen's Compensation Act, a question for jury determination?

The further question presented is:

2. Where respondent failed to request the trial court to submit the issue of petitioner's employee status under the Workmen's Compensation Act to the jury for determination on proper instructions, but instead obtained an erroneous reversal by the Court of Appeals which treated the issue as a matter of law, should the jury verdict in favor of petitioner be now reinstated, or is there some necessity for retrial?

#### CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are Rule 51 of the Federal Rules of Civil Procedure, and Sections 104, 203, 302(b), and 427 of the Pennsylvania Workmen's Compensation Act (77 PURDON'S PA. STAT. ANN. §§ 22, 52, 462, 872). The texts of these provisions are set forth in the Appendix at pages i-iii.

#### STATEMENT

This case was brought by petitioner in the federal district court on the basis of diversity jurisdiction. Petitioner, as administrator of the estate, sued for the

wrongful death of Norman Ormsbee, Jr., a youth of twenty years, who died on March 20, 1956, survived by a widow and three small children (R. 86a). He died in a crash of a tractor-trailer operated by respondent. The truck was en route with 36,000 pounds of steel from Syracuse, New York, to Midland, Pennsylvania, a distance of 350 miles (R. 62a, 66a). The accident occurred near Rochester, Pennsylvania, when the truck failed to negotiate an S turn downhill (R. 12a). Petitioner's decedent, who had been riding in the truck for a short distance, and the driver, Schroyer, were both instantly killed. The tractor-trailer was leased, complete with driver, to respondent by the owner of the truck, one Fidler (R. 121a).

The jury returned a general verdict for \$76,400, noting on the verdict slip, without direction by the court, that it found defendant "guilty of wanton conduct, in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the cause of the death of Norman Ormsbee, Jr." (R. 198a-199a). The jury also answered, in a fashion consistent with the general verdict, four special interrogatories prepared by the trial judge (R. 199a-200a), who prior to his advent to the bench had been an experienced Pennsylvania practitioner. Respondent's motions for a new trial and for judgment n.o.v. were denied by the trial court (R. 206a).

The Court of Appeals reversed the judgment below, holding that as a "question of law", which it could resolve, petitioner's status was that of an "employee" whose only remedy was under the Pennsylvania Workmen's Compensation Act. A timely petition for re-

hearing, principally addressed to a stay of proceedings, was denied.<sup>1</sup>

The evidence established that the respondent had operated defective leased equipment. In fact, as the trial judge noted in his opinion (R. 220a), neither respondent's evidence, nor any contention advanced by it, suggests that respondent made any routine inspection of Fidler's equipment before leasing it. Maintenance and repair of Fidler's truck was under the latter's control, although the equipment had been under lease to respondent for at least four years (R. 122a, 125a, 130a, 132a, 138a). Fidler himself did not perform such functions, but used an independent garage in a city near his home (R. 122a). Thus the ordinary repair of Fidler's equipment was certainly not in the hands of respondent.

~~Schroyer's trip from Syracuse which resulted in~~ the double fatality was remarkably beset by a combination of unusual difficulties. Schroyer picked up his load on March 13, 1956, in Syracuse for a 350-mile journey which was expected to take 20 hours, including resting time (R. 66a). Because of the accumulation of unanticipated difficulties, Schroyer was still on his way seven days later when the accident occurred.

During the seven-day period that Schroyer was en route, he was constantly in touch with Fidler, who had

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<sup>1</sup> In order to prevent the running of the Statute of Limitations, petitioner filed an administrative claim for workmen's compensation, which has remained dormant. Respondent denied responsibility and presumably is prepared to litigate once more the question of whether Ormsbee was an "employee" within the meaning of the Act. To prevent an unjust result, petitioner urged the Court of Appeals on rehearing to retain jurisdiction of this case by issuing a stay pending development of the Workmen's Compensation case—and particularly respondent's defense thereto.

hired him three weeks before and to whom he regularly looked for instructions (R. 122a-132a). For example, shortly after the trip commenced, Schroyer lost two tires in Batavia, New York. He communicated with Fidler, who proceeded from his base in Pennsylvania to Batavia with replacement equipment (R. 122a-123a). Fidler there instructed Schroyer not to proceed under certain anticipated weather conditions, and then departed. Again, when Schroyer later encountered battery trouble in Buffalo, he was in touch with Fidler, who specified the garage to be used for repair (R. 134a-135a). Moreover, it required specific authorization by Fidler for Schroyer to obtain an advance of funds from the Buffalo regional manager of respondent. The latter regarded Fidler as Schroyer's "boss" (R. 64a).

After advising respondent's Buffalo representative about brake trouble, and after a wholly superficial and inadequate test of the brakes was made, Schroyer proceeded to Waterford, just south of Erie, Pennsylvania, having completed slightly more than 230 miles of the journey (R. 62a-63a, 68a-69a). Schroyer stopped at Jones' Tavern just south of Waterford and there met Ormsbee and the latter's companion, Brown. Schroyer complained that he was having trouble with his equipment and offered to give Brown \$25 to ride with him for the balance of the trip, because he was afraid that he might run into more trouble. Brown refused, but Ormsbee accepted when the proposition was then put to him (R. 35a, 38a, 39a-40a, 48a).

Ormsbee was not authorized to drive in Pennsylvania, since his license there had been revoked (R. 106a). Moreover, there is nothing in the record to indicate that Ormsbee under any circumstances was ex-



pected to drive the truck, and in fact the evidence is that he was not driving the truck when the accident occurred (R. 19a, 49a). Ormsbee had had extensive experience with cars and had worked as a mechanic, although what Ormsbee was expected to do in the event of "trouble" was not defined (R. 73a-74a, 87a).

The two men left the tavern, and were seen to proceed in a southerly direction, with Schroyer in the driver's seat (R. 49a). There is no further evidence of their whereabouts until the discovery of the wrecked vehicle some five hours later, with both men dead.

Respondent's chief purpose throughout the trial was to establish that Ormsbee was a trespasser, so as to eliminate liability unless petitioner established wanton negligence.<sup>2</sup> The evidence shows that the truck carried a "No Rider" sign. Moreover, both Fidler and respondent had instructed Schroyer that he was to carry no riders. Schroyer, in a written response to a question as to the circumstances under which he might have a rider, responded "No time." This answer, according to the testimony, was the only one acceptable to the respondent, and thus represented its company policy (R. 132a, 141a, 142a).

In pursuing its purpose to show that Ormsbee was a trespasser, respondent made no effort to establish that any of its trucks were ever manned with two drivers; nor to show that they ever were manned with a driver and a non-driving mechanical or other assistant; nor to show that at any time in the past it had ever permitted anyone to ride on one of its trucks for a business purpose. And certainly it made no effort to

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<sup>2</sup> Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, involving one aspect of this Pennsylvania rule.



show that any past emergency had ever necessitated an employee of respondent engaging either an emergency employee or an emergency agent on its behalf to ride on any of its equipment. The inference, rather, is clear that Ormsbee as a rider was performing a highly extraordinary and unexpected function.

At one stage of the trial, the judge informally commented to counsel that Ormsbee appeared to be a trespasser, but that the submission of special interrogatories might help clarify the jury's view on this and related questions (R. 119a). Later, the judge stated that his view on Ormsbee as a possible trespasser had been shaken by Fidler's testimony (R. 163a). Fidler, particularly in response to questions from the bench, had testified that he authorized garage repairs for his equipment, permitting Schroyer while on the road to "engage" a needed service (R. 132a).

At the conclusion of the taking of testimony, the court framed four pertinent special interrogatories (R. 160a). These were submitted for answers by the jury, to be returned along with a general verdict. Interrogatory No. 1 was to determine the jury's view as to whether Ormsbee was some sort of business licensee to whom respondent owed a duty of ordinary care. The interrogatory read:

"Interrogatory Number 1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?" (R. 199a).

To this interrogatory the jury responded in the affirmative.<sup>3</sup>

In a colloquy with counsel, before submitting this interrogatory to the jury, the trial judge carefully noted that this interrogatory had been framed so as not to inquire whether Ormsbee was an employee of respondent, because that was a question of law for the court. The trial judge stated during this colloquy:

“Number 1 I think is directed at one of the issues here. I have said, you see, you notice there I refrain from saying just what his status is. I don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law. We might have to look at that afterwards, it depends on what you think of it.” (R. 169a).

The respondent did not challenge this procedure of reserving the question for the court as to Ormsbee's status, and this is a matter of utmost significance.

Respondent submitted to the court certain requested instructions. Among these was its Request No. 7. This asked for a binding instruction to the jury that the Pennsylvania Workmen's Compensation Act provided

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<sup>3</sup> The other interrogatories inquired whether respondent was negligent, to which the jury responded in the affirmative; whether the braking equipment was in proper working order, to which the answer was in the negative; and whether respondent was guilty of wanton conduct in failing to maintain the braking equipment in proper working order, to which the answer again was in the affirmative. The jury thus found the necessary wanton conduct to make it immaterial whether Ormsbee was a trespasser, but also by its answer to Interrogatory No. 1 found that Ormsbee was not a trespasser (R. 199a-200a).

the exclusive remedy if the jury found an emergency existed which justified Schroyer in hiring an assistant.<sup>4</sup> Respondent in due course excepted generally to the charge, and also excepted to the failure to give this binding instruction (R. 197a). However, although specifically invited by the court to ask that additional instructions be given the jury, respondent did not request the court to instruct the jury on the "employee" question, so as to permit the jury to decide the issue without a binding instruction (R. 195a-196a).

Since this is important, it should be stressed that respondent did not request that the jury be instructed to consider and determine whether Ormsbee was employed "in the regular course of the business of the employer." Respondent made no request that this statutory language of "regular course of the business", or any equivalent language, be presented to the hearing of the jury. Nor did respondent ask that the jury be instructed to determine whether Ormsbee was an employee as opposed to an agent, and if so, whether he was an employee of respondent.

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<sup>4</sup> Respondent's Request No. 7 read as follows:

"If you find that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc. and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."

(This Request appears in the certified record before this Court at p. 2 of Appellant's [Respondent's] Answer to Appellee's Petition for Rehearing and Stay of Mandate.)

After the jury's verdict was returned, respondent moved for a new trial and for judgment n.o.v. Respondent contended that Ormsbee was a trespasser and that the record did not support either the special findings of an emergency situation, or of wanton negligence. Alternatively, respondent urged that Ormsbee was an "employee" within the meaning of the Workmen's Compensation Act, so as to bar the instant suit and provide an exclusive administrative remedy. Respondent conceded that Ormsbee's employment was "casual," within the meaning of the Act, but contended that the employment was "in the regular course of respondent's business."<sup>5</sup>

The trial court denied respondent's motion, and once again specifically called attention to the fact that:

"Although at pretrial the status of decedent's relationship with defendant was raised and discussed, the interrogatory to the jury was not so phrased as to require the jury to determine whether decedent was an employee of Aetna." (R. 210a).

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<sup>5</sup> Respondent also urged in its brief in support of its motions that Ormsbee was within the coverage of the Act because of a specific provision dealing with "employees of employees." One of the main point headings in respondent's brief was the following:

"The Pennsylvania Workmen's Compensation Act expressly provides that its provisions shall apply to employees of employees; 77 P.S. § 462."

See also, § 203, 77 PURDON'S PA. STAT. ANN. § 52. The trial judge in his opinion specifically rejected this contention, pointing out that the law applied only to "employees of employees" operating on respondent's "premises." (R. 211a).



The trial judge further stated that Special Interrogatory No. 1

“was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging decedent to accompany him on the remainder of the trip in protection of defendant’s interests.” (R. 211a).

The trial judge thus reiterated the view that he had expressed before submitting the interrogatory to the jury that the interrogatory was so framed as to reserve to the court the question of Ormsbee’s status as an “employee” within the coverage of the Act.

The Court of Appeals reversed the judgment below. The Court held that Ormsbee’s status was a “question of law” and “open to review.” In so deciding, the Court relied principally upon SKINNER, a secondary treatise on the Pennsylvania Workmen’s Compensation Act, which dealt with State court practice (R. 232).

The Court of Appeals, relying on Pennsylvania decisions, correctly defined “regular course of the business” as depending upon whether the employment was an “ordinary operation,” or, stated somewhat differently, the “normal operations which regularly constitute the business” of the employer. The Court, however, surprisingly concluded that since Ormsbee was properly on the truck by virtue of the emergency, this

“put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all.” (R. 232).



## SUMMARY OF ARGUMENT

### I

1. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, holds that, in a federal diversity case, the factual question of whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. Contrary state practice does not apply.

Here two fact issues were presented as to the employment status of petitioner's decedent: first, whether Ormsbee was respondent's employee, rather than the agent or employee of Fidler or Schroyer; second, on the assumption that Ormsbee was respondent's employee, whether he was employed in the "regular course" of respondent's business. Unless *both* questions are decided in favor of respondent, the Workmen's Compensation Act would have no effect on petitioner's right to recover in this proceeding.

The Court of Appeals, in erroneous reliance on state practice, disposed of both of these fact questions in favor of respondent. Respondent had made no effort to obtain a jury determination of these issues. It had sought a binding instruction which had been refused, and then was content to present to the jury only the question of whether Ormsbee was a trespasser.

The Court of Appeals, relying on a secondary treatise on state practice in workmen's compensation cases, resolved these questions as matters of law which it stated were open to review. This was patent error under *Byrd*.

2. On the facts in evidence, Ormsbee's employment status was for the jury.

In the first place, it would have been reasonable for the jury to have concluded that Ormsbee, while properly present on the truck, was not the employee of respondent. Fidler had maintained a continuing control over the equipment which he owned and over Schroyer whom he had hired to drive his truck. In particular, Fidler had maintained control of repairs and maintenance of his equipment, both on and off the road. The testimony supports the inference that the emergency that gave rise to Ormsbee's hiring was the prospective handling of broken-down equipment, a matter of direct concern to Fidler.

In the second place, it would have been reasonable for the jury to have concluded, on the assumption that Ormsbee was the employee of respondent, that he was not employed in the "regular course" of respondent's business. Under *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), the words "regular course" serve to distinguish "normal" or "ordinary" business operations from "occasional" or "incidental" operations. Ormsbee's extraordinary hiring and brief employment hardly constituted a "normal" or "ordinary" operation of respondent. Rather it arose out of a combination of difficulties extending a 20-hour trip into a week-long journey. The facts and reasonable inferences are that respondent did not permit "riders," utilize roving mechanics for emergency repairs, nor employ riding assistants. Nor did respondent expect Ormsbee to drive the vehicle, and he in fact was not licensed to do so. Moreover, he was hired in such unusual circumstances that respondent was to insist throughout the trial that he was merely a trespasser. A jury could have found such an emergency employment of a casual tavern acquaintance not in "regular course," but simi-

lar to the emergency hiring of a passerby. *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939).

## II

Respondent refrained from seeking a jury determination of Ormsbee's employment status. It relied instead before the jury solely on the unsuccessful alternative contention that Ormsbee was a trespasser. It cannot now seek a new trial for presentation of additional issues to a jury.

There was a clear strategic advantage to be gained by respondent in so confining the case it presented to the jury. Respondent sought a decision only from the court on the question of whether the Workmen's Compensation Act barred recovery in the instant proceeding. For reasons of its own choosing, advantageous or otherwise, respondent made no effort to obtain instructions for a submission to the jury of the two questions as to Ormsbee's employment status. Even if respondent erroneously believed that the issues should be decided by the court alone, respondent nevertheless could have fully protected its position by seeking the required instructions.

Having failed to request a charge, or object specifically to any omission from the judge's charge, respondent cannot now seek to relitigate the case by obtaining a fresh opportunity to present the additional issues to a jury. The interests of sound judicial administration, as expressed in the Rules of Civil Procedure and the decisions of this Court, require this result. Rule 51, Federal Rules of Civil Procedure; *Louisville & Nashville R. R. Co. v. Parker*, 242 U.S. 13; *Palmer v. Hoffman*, 318 U.S. 109, 119; *United States v. Atkinson*, 297

U.S. 157, 159. This Court should, therefore, direct reinstatement of the jury verdict in favor of petitioner.

## ARGUMENT

### I

THE COURT OF APPEALS IN RELIANCE ON STATE PRACTICE  
ERRONEOUSLY ASSUMED FUNCTIONS RESERVED TO THE  
JURY UNDER FEDERAL PRACTICE.

A. THE COURT BELOW, IN ERRONEOUS RELIANCE ON STATE PRACTICE, DECIDED ORMSBEE'S EMPLOYMENT STATUS AS A QUESTION OF LAW.

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, this Court held that, in a federal diversity case, the factual question of whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. This Court decided that *Erie R. Co. v. Tompkins*, 304 U.S. 64, does not require that the federal court follow state practice when it is contrary to the federal rule favoring jury trial.

Indeed any other rule would raise a serious constitutional question under the Seventh Amendment. This constitutional question would likewise appear if, in diversity cases, the scope of the review of jury verdicts by federal appellate tribunals were enlarged in reliance on state practice. *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 53, fn. 5.

The function of the jury in a federal court proceeding needs little exposition. This Court has made it clear that it lies within the province of the fact-finding body—whether it be a jury or an administrative board—to apply the relevant statutory standard to the



facts of the case.<sup>6</sup> In doing so, the fact-finder considers the applicability to the facts of statutory standards, such as those delineating the circumstances under which coverage is provided, *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 ("course of employment"), *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469 ("course of employment"); those defining the persons who are covered, *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 ("member of a crew"); and those prescribing the equipment required for safety, *Myers v. Reading Co.*, 331 U.S. 477 ("efficient hand brakes"). In the process, the finder of fact weighs and resolves conflicts in the testimony, *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29; and determines what inferences it will draw from the basic facts, *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 477. Moreover, the decision of what inferences to draw is for the fact-finder even where the facts are not in dispute. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353; *Boehm v. Commissioner of Internal Revenue*, 326 U.S. 287, 293; *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 478. And where a jury is applying a statutory standard, the party who hopes to benefit from the resolution of the issue has the right to request from the court a proper instruction explaining that standard.

As is developed in the Statement, quite contrary to federal practice as to the jury's proper function, Ormsbee's employment status was treated below as a question of law for the court to resolve. The Court of Appeals reached its decision in reliance on Pennsylvania practice as to the function to be performed by the court.

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<sup>6</sup> *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372, fn. 2.



The factual issues of employment status around which this case turns at this stage are two-fold. The first is whether Ormsbee must be regarded as having been respondent's employee in spite of his relationship to Fidler and Schroyer under the unusual circumstances of his hiring. On the assumption that respondent was the employer, the second factual issue is whether this unusual employment was in the "regular course of the business" of respondent. Only such employment is covered by Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22.

Respondent, in the trial court, did not request that the jury be instructed to determine on the facts whether Ormsbee was an employee of the respondent within the meaning of the Workmen's Compensation Act, and more particularly did not request an instruction on Ormsbee's status as an employee in the "regular course of the business" of the respondent. The trial judge, in keeping with his view of Pennsylvania practice, was content to treat the issue as a matter of law. The Court of Appeals likewise held that the issue was a "question of law" for it to decide under Pennsylvania practice, although reaching the opposite conclusion as to the applicability of the Act.

The Court of Appeals specifically stated that it was deciding the question as one of law in reliance on SKINNER, a secondary treatise on the Pennsylvania Workmen's Compensation Act.<sup>7</sup> The Court quoted SKINNER as holding the issue to be "a question of law, and open to review." (R. 232). The parallel to *Byrd*

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<sup>7</sup> SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW (4th ed. 1947).

is manifest, because SKINNER, in defining Pennsylvania practice, was primarily concerned with the circumstances under which a court might "review" the decision of the Workmen's Compensation Board, the administrative tribunal which decides compensation cases. The applicable statutory section, § 427, 77 PURDON'S PA. STAT. ANN. § 872, provides for an appeal to the courts from any action of the Board "on matters of the law." Consequently, while factual questions are for the administrative tribunal, questions of law may be reviewed by the court.<sup>8</sup>

Thus the underlying reason for the Pennsylvania practice declaring employment status to be a matter of law for the court is to permit judicial review of the decisions of the administrative board. *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922); *Blake v. Wilson*, 268 Pa. 469, 112 Atl. 126 (1920); *Passarelli v. Monacelli*, 121 Pa. Super. 32, 183 Atl. 65 (1936); *Boyd v. Philmont Country Club*, 129 Pa. Super. 135, 195 Atl. 156 (1937); *Barnett v. Bowser*, 176 Pa. Super. 17, 106 A.2d 457 (1954).

The Pennsylvania practice which the Court of Appeals was endeavoring to follow was largely derived from state practice in review of administrative compensation decisions. It cannot be gainsaid, however,

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<sup>8</sup> The Court of Appeals, as further support for SKINNER, footnoted a reference to *Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953), a Workmen's Compensation Board case. The state court there concluded that the drawing of inferences from basic facts of record as to the "regular course" of the employer's business is for the court as an issue of law. This should be contrasted with the role ordinarily assigned the fact-finding board in the drawing of inferences from basic facts. Cf. *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 477.

that this practice is commonly carried over to tort cases brought in the state courts. When issues of employment status arise, which possibly would defeat the action and require the plaintiff to look solely to workmen's compensation for relief, the courts hold that the question is a matter of law for the court. *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939); *Persing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). That is how the state practice was applied in the court below.

The facility with which fact issues as to statutory coverage are translated into questions of law can be seen in *Butrin v. Manion Steel Barrel Co.*, 361 Pa. 166, 63 A.2d 345 (1949). There, in a trespass action, a somewhat different issue was presented as to whether an accident occurred while the plaintiff was engaged in the course of his employment. The state court sharply divided 4 to 3, drawing opposite inferences from the same facts, but all proceeding on the basis that the inferences were for the court as a matter of law, with no need to submit the issue to the fact-finder.

While the Pennsylvania practice of withholding from the jury the decision as to the applicability of the Workmen's Compensation Act is common, we do not believe that we can be belabored with a charge of challenging the interpretation of the court below of state practice by stressing that this Pennsylvania practice is not basic to any statutory scheme. It cannot be deemed to be an integral and fundamental part of the Pennsylvania statutory plan, so as to have some special claim for respect under *Erie R. Co. v. Tompkins*, 304 U. S. 64.<sup>9</sup> It is not bound up with state statutory

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<sup>9</sup> See *Walters v. Kuufmann Department Stores, Inc.*, 334 Pa. 233, 5 A.2d 559 (1939). In this common law action, the question of

rights and obligations. Thus it would not do violence to the Pennsylvania statute for this Court to follow its "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. at 538. In any event, the *Byrd* case has made it clear that trial by jury of the question of coverage of workmen's compensation laws is not so clearly productive of a different substantive result as to suggest the state rule should prevail under *Erie R. Co. v. Tompkins*, *supra*.<sup>10</sup>

It will thus be seen that in the instant case federal practice controls as to the allocation of function between judge and jury, and as to the scope of appellate review. It was improper for the court below to rely on state practice. And as we shall now see, under federal practice Ormsbee's employment status was within the province of the fact-finder; therefore, respondent, in seeking to defeat the cause of action, should have had the issues submitted for determination by the jury.

#### B. THE ISSUES CONCERNING ORMSBEE'S EMPLOYMENT STATUS WERE FOR THE JURY.

This case presented a real question of employment status. If respondent wanted to defeat recovery for its tortious conduct on the basis of the applicability of the Workmen's Compensation Act, it should have asked the jury, and not the court, to decide the matter. The

employment status was presented, though not the question of "regular course of the business." The issue was treated as a question for determination by the jury.

<sup>10</sup> The Constitutional guarantee of jury trial would likewise suggest the same result, though this issue was not reached in the *Byrd* case. 356 U.S. at 537, fn. 10. See *Herron v. Southern Pacific Co.*, 283 U.S. 91.



record provides a sufficient basis from which the jury, if it believed the testimony, could infer that Ormsbee was not *respondent's* employee; or, in any event, in the unusual situation prevailing, he clearly was not engaged in the "regular course" of respondent's business.

1. The relationship among the truck driver Schroyer, the lessor Fidler, and the respondent was complex. *Cf. Gearhart v. Summit Fast Freight, Inc.*, 167 Pa. Super. 481, 75 A.2d 606 (1950); *D'Alessandro v. Barfield*, 348 Pa. 328, 35 A.2d 412 (1944); *Kimble v. Mackintosh Hemphill Co.*, 359 Pa. 461, 59 A.2d 68 (1948). The question of who, if anyone, was Ormsbee's employer when he was engaged by Schroyer during his stop at the tavern was for the jury.

Surprisingly, the Court of Appeals did not consider whether Ormsbee could have been the employee of someone other than respondent. The court below was deciding Ormsbee's status as a matter of law, and was not evaluating what a jury could reasonably have found. Nevertheless, should the court have merely assumed that Ormsbee was engaged by the truck driver Schroyer for respondent?

While Schroyer may or may not have been an employee of respondent in his role as driver of the leased equipment, certainly as to certain functions he maintained a general employment relationship with the lessor Fidler. This relationship was clearly understood by the Buffalo regional manager of respondent who not only referred to Fidler as Schroyer's "boss," but also declined to advance funds to Schroyer without Fidler's prior consent. Moreover, as has been pointed out in the Statement, Fidler constantly directed Schroyer's movements during the seven-day period that the latter was en route from Syracuse, particularly with respect to the care and repair of the truck.



It was Fidler's testimony that persuaded the trial judge that Ormsbee might reasonably be found to be something other than a trespasser. And Fidler's testimony was that he arranged for garage repairs of his equipment, and authorized Schroyer to engage any needed service on the road.

The nature of the emergency must be understood to consider the nature of any contemplated duties, and for whom they were to be performed. The emergency had not arisen in the instant case because of any health condition of the driver, with the possible need for a substitute.<sup>11</sup> It is, therefore, clear that Ormsbee was not engaged to drive the leased equipment. In fact, he was not licensed to drive in Pennsylvania at all. Here Fidler had authorized necessary repairs and services, and the jury had specially found an emergency had arisen which justified engaging Ormsbee. ~~The nature of the emergency was such that Ormsbee in this setting could reasonably have been considered as engaged on behalf of Fidler to help handle a broken-down truck.~~

It of course would not have been necessary for a jury to find that Ormsbee was respondent's employee in order to conclude that Ormsbee was not a trespasser as to respondent. So long as Ormsbee's presence on the truck served respondent's interests, Ormsbee was a business visitor and not a trespasser under Pennsyl-

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<sup>11</sup> See Illustrative Example 5 to § 79, RESTATEMENT, AGENCY 2d, which reads:

"5. P employs A as a truck driver to carry a valuable load of perishable fruit to a distant town. En route, A becomes ill and unable to drive. Being unable to communicate with P, he employs B, a competent driver, to take his place for the trip. It may be found that A was authorized to employ B as P's servant."

vania law. *Kimble v. Mackintosh Hemphill Co.*, 359 Pa. 461, 59 A.2d 68 (1948). See also, RESTATEMENT, TORTS § 332; RESTATEMENT, AGENCY 2d § 242, Com. b.

Obviously the repairman who serviced the battery in Buffalo at Fidler's direction would not have been a trespasser as to respondent. His presence on the truck would have been for a business purpose, irrespective of whether he was an independent contractor or an employee. Similarly, Ormsbee, when properly present on the truck because of an emergency, could have been considered by a jury as an authorized business visitor as to respondent, but as an agent acting for Fidler or for Schroyer.

Consequently, the existence of an emergency situation that justified Schroyer in engaging Ormsbee does not resolve the question as to whose employee Ormsbee became upon being engaged. That issue of employment status is one that respondent should have put to the jury if it wished to bar recovery.

2. On the assumption that Ormsbee was respondent's employee, there still remains the issue of employment in the "regular course of the business." A jury, if presented with the issue of employment in the "regular course of the business," could well have concluded that the extraordinary, but brief, mission of Ormsbee as a non-driving, but traveling mechanic or emergency helper, did not qualify him for workmen's compensation coverage. This becomes clear upon considering the Pennsylvania courts' long-established construction of the statutory provision, § 104, 77 PURDON'S PA. STAT. ANN. § 22, which excludes "persons whose employment is casual in character and not in the regular course of the business of the employer."

The leading case in defining "regular course" is

*Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), in which the court stated:

“The legislature evidently intended, by the use of the words ‘regular course,’ to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . .” (272 Pa. at 72, 115 Atl. at 895).

See also, *Blake v. Wilson*, 268 Pa. 469, 112 Atl. 126 (1920); *Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953). This test of “normal operations,” quoted by the Court of Appeals in its opinion (R. 232), does not require resort to any rigid formula for its application. It is a question of what inferences should be drawn from the facts.

The decision of the Court of Appeals, premised as it was on the erroneous conclusion that the question was one for it to decide, shows that it failed to face up to the question of the “normalcy” of the operation in which Ormsbee was engaged. The Court simply stated that “the hiring of Ormsbee put him into the regular business of defendant, namely, *transportation of goods by truck*.” (R. 232). (Emphasis supplied.) If anything is clear, it is that Ormsbee had nothing to do with the transportation of goods by truck. He did not drive; he was not licensed to drive; and he was not expected to drive. If a breakdown had occurred, presumably Ormsbee would have helped in a mechanical or related capacity in meeting the “trouble” which led to his engagement in the first place. His services were not the “transportation of goods by truck,” but the pro-

spective handling of broken-down equipment owned by the lessor, Fidler.

Of course it is possible for a company which is engaged in the "transportation of goods by truck" to perform other connected functions. These functions, if ordinarily performed by the company itself, may be in the "regular course of the business" of the company, even though not involving transportation of goods by truck. Cf. *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), distinguishing emergency repair of machinery from ordinary maintenance operation.<sup>12</sup> However, the Court of Appeals was content to classify Ormsbee as an employee in "regular course" by simply stating that he was engaged in the transportation of goods.

In the instant case, it appears that even the ordinary repair functions performed on equipment leased from Fidler and others was handled for respondent by independent contracting garagemen, rather than as a routine supplementary function of the respondent's business. Thus respondent did not do even this kind of work *regularly*. Be that as it may, the testimony shows how far removed from "ordinary" or "normal" was the transportation of Ormsbee in the emergency. Ormsbee's role arose out of an emergency due to a week-long ordeal in covering the distance of a day's journey. Ormsbee was engaged by an underling who was under

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<sup>12</sup> The repair work must usually be done by the company for itself, and not contracted out. As the court said in *Callihan, supra*: "... but such work if not of a kind usually performed by or under the control of the person conducting the business, would be outside the regular course thereof." (272 Pa. at 72, 115 Atl. at 895). See also, *Miller v. Farmers Nat. Bank*, 152 Pa. Super. 405, 33 A.2d 646 (1943).



strict orders that he was to have "no riders" with him at any time. The respondent and Fidler did not normally operate trucks with employees whose functions were those which Ormsbee was to provide. Respondent itself was to insist throughout the trial that, in relation to its operation, Ormsbee's role was so far from normal or routine that he was a trespasser. Only the extraordinary course of events justified the emergency engagement of Ormsbee to perform unusual functions in respondent's interests. The inference is that in respondent's normal operation, it neither provided roving mechanics, riding assistants, nor \$25-a-trip short-haul companions.

If presented with the question, the jury might well have concluded that Ormsbee was not engaged in the transportation of goods, and was not otherwise engaged in what would be considered a "normal operation" of respondent. The jury could have adhered to its view that the very abnormality of the operation and situation at hand meant that Ormsbee was not a trespasser on the truck, but had a business purpose to perform. At the same time the jury could have found that Ormsbee's role in respondent's affairs was not that of an employee in the "regular course" of the latter's business.

The question of employment by respondent, rather than by Fidler or Schroyer, and the question of whether this employment was in the "regular course" of respondent's business, involve a weighing of the facts and the inferences from the facts. While Pennsylvania precedents in other factual situations do not provide significant guidance, a few cases should be examined. The Court of Appeals relied heavily on *Persing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). There the hauling away of a stalled trolley was held to



be in the regular course of business of the trolley company. The hiring of a tractor and driver to perform the job was far from extraordinary, because the same tractor and driver had been hired only thirty days before for the same purpose. Further, as the record shows, the Superintendent of Transportation of the trolley company did the hiring.

The Pennsylvania Supreme Court has held more recently, in *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939), that the emergency employment of a passerby to help remove another employee of an electric power company, when he had become entangled in the power lines, was not in the "regular course" of the defendant's business. Therefore, a suit for damages would lie when the passerby, who had become an emergency employee, was injured by the carelessness of another employee of the defendant. The function of providing electric power could not go forward until the man was removed, because pending his being extricated the power lines had to be shut off. But the court thought that the service rendered was not "regular" because rendered "under an abnormal, unexpected and accidental circumstance." 336 Pa. at 507, 9 A.2d at 549.

In view of *Vescio*, a jury determination that Ormsbee was not engaged in the "regular course" of respondent's business would have been reasonable. *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951), points to the same conclusion. This recent decision by the Colorado Supreme Court was reached under a statute construed identically to the Pennsylvania courts' construction of the "regular course" provision. In the *Heckman* case a truck en route on the highway caught fire. A gasoline station attendant, whose assistance was sought, boarded the truck to help put out the fire. While

the court held the attendant an emergency employee of the trucker, the employment was not in the "normal operations constituting the regular business of the employer." 124 Colo. at 509, 238 P.2d at 860.

In summary, the two fact questions as to Ormsbee's status properly belonged with the jury. There was a reasonable basis for the jury to decide either or both in favor of petitioner, in which case respondent could not succeed in its present assertion that the Workmen's Compensation Act bars recovery.

## II

SINCE RESPONDENT REFRAINED FROM SEEKING A JURY DETERMINATION OF ORMSBEE'S EMPLOYMENT STATUS, BUT INSTEAD RELIED ON UNSUCCESSFUL ALTERNATIVE CONTENTIONS BEFORE THE JURY, RESPONDENT CANNOT NOW SEEK A NEW TRIAL FOR PRESENTATION OF ADDITIONAL ISSUES TO A JURY.

The second question presented by the Petition for Certiorari is whether there is any necessity for a retrial in this proceeding. We submit that this Court's judgment should make it clear that no such retrial is necessary. In fact, reinstatement of the jury verdict is proper on this record.

As has been demonstrated in Part I, *supra*, the issues of Ormsbee's employment status were properly for the jury. Respondent could have sought such a jury determination in a federal court proceeding, but refrained from doing so. Respondent could have asked that these issues be presented to the jury, and, in the event of an adverse verdict, still have been free to request the trial court for judgment n.o.v. Instead, respondent elected to present a single theory of its defense to the jury. Respondent decided, insofar as the jury was concerned,

to have it listen solely to the argument that Ormsbee was nothing but an unauthorized trespasser who was entitled to protection only against wanton misconduct. In all likelihood, respondent preferred that the jury have the case in this simple posture, with the court alone deciding the questions of the applicability of the Workmen's Compensation Act.

It can hardly be denied that respondent derived strategic advantage from its firm stand before the jury that Ormsbee was nothing but an intruder—an unwanted trespasser. There was no vacillation in this position; there were no “if’s, and’s, and but’s.” There was no tacit recognition, for the sake of an alternative argument before the jury, that perhaps Ormsbee was authorized to be on the truck; and, if he was authorized the jury should remember that respondent then claimed that Ormsbee was its employee, not anyone else’s—and, what is more, its employee in such a normal and ordinary manner as to be in “regular course.” Could respondent have presented this alternative argument without weakening its basic position that Ormsbee was so divorced from its normal business operation as to be a trespasser? Obviously not.

It is clear, therefore, that, whatever the reason for its decision to reserve the workmen's compensation issues for the court, respondent achieved a strategic advantage. This advantage would have been dissipated if respondent had attempted to persuade the trial judge, after its Request No. 7 for a binding instruction had been refused, that the court should instruct the jury to consider and decide the workmen's compensation questions.

In spite of the advantage of an undiluted and concentrated defense before the jury based on the single

theory that petitioner's decedent was a trespasser, the jury returned its verdict for petitioner. Now the question is whether respondent's alternative theory with respect to the Workmen's Compensation Act should be given a belated airing before a new jury, which also would be importuned to adopt respondent's original trespasser theory.

The procedural course that was open to respondent is made clear by Rule 51 of the Federal Rules of Civil Procedure. The Rule provides for the filing of written requests for instructions to the jury. The Rule further provides:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

While respondent entered a general objection to the charge by the judge, and an objection to the failure of the court to instruct on those of its special requests which had been rejected (R. 197a), respondent neither requested the court, nor objected to its failure, to charge the jury as to the circumstances under which the Workmen's Compensation Act would apply so as to defeat the cause of action. Respondent was content to ask for a binding instruction in its Request No. 7. This Request did not even advise the jury that only those employees engaged in the regular course of respondent's business were covered by workmen's compensation. The Request rather was specifically tailored to withdraw from the jury not only the question of "regular course of the business," but also the question of whose employee Ormsbee was intended to be.



Failing to obtain the binding instruction which it requested, respondent did not care to have the issues submitted to the jury. When the trial court asked counsel if there was anything further which they desired to have added to the charge, respondent's counsel requested additional instruction in connection with contributory negligence, and after these were given, he specifically stated that there was nothing further on which he desired to have the jury charged (R. 195a-196a).

Respondent's Brief in Opposition, at p. 16, advances the surprising contention that if petitioner feels that additional instructions were needed, petitioner should have asked for them. This, of course, confuses the whole point. Petitioner is not objecting to the instructions given, and petitioner is not objecting to the jury verdict in its favor. It is respondent who is objecting to the jury verdict. It is respondent who is relying on the Workmen's Compensation Act in order to defeat petitioner's cause of action. If, as we believe, the issues of Ormsbee's employment status were for the jury, and, if respondent wants to upset the jury verdict, it would have to show that the court's instructions failed in some material respect in spite of respondent's requests for charges. In short, it is respondent who is insisting that petitioner's cause of action should be dismissed because the remedy under the Workmen's Compensation Act is exclusive. Patently, since petitioner was not urging the dismissal of his own cause of action, there was no necessity for petitioner to see to it that the jury was instructed as to the circumstances under which his cause of action might fail. *Palmer v. Hoffman*, 318 U.S. 109.

The record does not show all the factors that may



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have entered into respondent's decision not to ask for instructions to the jury on the "employee" issues under the Act. Perhaps respondent did not object to the omission in the charge because it assumed, along with the trial court, that under Pennsylvania practice the issues were solely for the court, even though the court be federal. If this were the reason, respondent could have protected its position by nevertheless requesting the instructions. If the instructions had been granted, and the verdict were for petitioner, respondent could thereafter have urged the court that it should nevertheless decide under Pennsylvania practice that the Compensation Act barred recovery. On the other hand, if the instructions had been refused, and the verdict were for petitioner, respondent again would have been fully protected. Upon any subsequent holding on appeal that in a federal court the questions were for the jury, respondent, in view of its request for instructions, would then have been entitled to a new trial.

However, respondent's strategy was to center the jury's entire attention on the trespasser issue, which was its principal line of defense. As we have noted, it would have weakened respondent's position to have had the jury instructed that Ormsbee might be an unusual type of employee who was not even covered by workmen's compensation. Such an instruction might have made Ormsbee look less like a trespasser in the eyes of the jury. Respondent, therefore, not only in fact derived an advantage from its single theory presentation, but normally could be expected to understand that it was obtaining an advantage in not having its secondary position—that the Workmen's Compensation Act controlled—submitted to the jury, except upon a binding instruction.

It is, of course, not material why respondent decided to forego its privilege of requesting jury instructions. It does not matter whether it mistook the law, or took a calculated strategic risk. It has long been settled that parties who fail to request charges, for whatever reasons may appeal to them, cannot later impose upon the court and the other party the burden of retrial.

Thus this Court has held, in an opinion by Mr. Justice Holmes, that where a binding instruction was requested, which was properly denied, and which was not followed by a request for submittal of the issue to the jury on proper instructions, no claim of error can be made because of the failure of the court to instruct the jury. *Louisville & Nashville R.R. Co. v. Parker*, 242 U.S. 13. The *Louisville* case involved a damage action which would lie only if plaintiff's employment was in intrastate commerce. The defendant asked for a directed verdict that the plaintiff was engaged in interstate commerce, and this request was denied. Defendant did not ask for the opportunity to have the issue submitted to the jury, possibly because the judge assumed "throughout that intrastate commerce alone was involved. As Mr. Justice Holmes stated, at p. 15:

"It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand."

In fairness to the trial court and the other party, an erroneous charge on the law, or an omission from the charge, must be specifically called to the trial court's

attention. If this is not done, the complaining party cannot later contest the jury verdict. *Palmer v. Hoffman*, 318 U.S. 109, 119; *Pennsylvania R.R. Co. v. Minds*, 250 U.S. 368, 375. Where there is no request for a charge, nor objection to the charge as given, the verdict should stand in the interest of ending litigation. *United States v. Atkinson*, 297 U.S. 157, 159; *Humes v. United States*, 170 U.S. 210; *Texas & Pacific Railway v. Volk*, 151 U.S. 73, 78. And where a party has additional theories to sustain his position, but requests no instruction with respect to them, Rule 51 precludes re-examination. *Cafasso v. Pennsylvania R. Co.*, 169 F.2d 451 (3d Cir. 1948).

*Palmer v. Hoffman*, *supra*, is particularly pertinent. There, in a diversity case, two causes of action for negligence were based on a Massachusetts statute, and two on the common law. The trial court, without distinguishing between them, charged that the burden of proving contributory negligence was on defendant (petitioner). This was a correct interpretation with respect to the statutory causes of action, but apparently incorrect as to the common law counts, where the burden of proving freedom from contributory negligence would have been on the plaintiff (respondent). The defendant below, like the trial court, had not fully comprehended the distinction, but simply requested a flat instruction that the burden was on plaintiff as to all four causes of action. The request was refused. This Court, on certiorari to the Second Circuit, ruled that even a partially correct request for a charge was not sufficient to obtain a new trial. "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." (318 U.S. at 119).

*United States v. Atkinson, supra*, shows the same approach. The trial judge's charge to the jury as to the meaning of "total disability" under a government insurance policy was not objected to by petitioner, the United States. At the trial stage, petitioner did not challenge the validity of its own Veterans' Administration regulation upon which the charge to the jury was based. The case proceeded on the possibly erroneous theory that the statement of law by the court was correct, and it was only on appeal that petitioner attacked the jury verdict and asserted the need for a new trial to permit a proper instruction. The Supreme Court ruled that "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end" dictated sustaining the jury verdict (297 U.S. at 159).

It is respectfully pointed out that the problem as to the nature of the mandate that should issue here is different from that in the *Byrd* case. In the *Byrd* case, petitioner, before completing his case, induced the trial court to strike respondent's defense based on the Workmen's Compensation Act. The trial court gave respondent an exception to the striking of its defense. Thus petitioner effectively prevented any submittal of the issue to the jury.<sup>13</sup> With the record on the issue incomplete, and the respondent's defense stricken, there was no issue on which the jury could have been instructed. In the instant case this procedural situation did not prevail. All of the testimony was taken.

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<sup>13</sup> As this Court stated in its opinion in *Byrd*: "His [petitioner's] motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence." 356 U.S. at 532.



The trial court made no determination on its own of the issues pertaining to workmen's compensation prior to the submittal of the case to the jury. Respondent thus was at all times free to seek a jury decision on these issues, as well as on any of the other issues upon which it wished to rely in persuading the jury to find for it.

In short, if this Court holds in the instant case that under the *Byrd* precedent the employment status of Ormsbee was for the jury to decide, then the jury verdict must stand, since respondent cannot demand another chance before another jury to request appropriate instructions. Respondent should not gain a fresh opportunity before another jury to retry all the issues in this case, simply because it failed to ask for a jury charge. Such a *seriatim* approach would be burdensome to the litigants and a mockery of that sound judicial administration which is reflected in Rule 51 and the cases cited.

We submit that, in addition to holding that no new trial is needed, this Court should also direct reinstatement of the jury verdict. All issues presently pertinent to this case were resolved by the court below, except the contention that the jury verdict was excessive.<sup>14</sup>

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<sup>14</sup> The respondent, in its appeal brief to the court below, raised five points.

The first, third, and fourth points, respectively, maintained (I) that there was no "emergency" to take plaintiff out of the trespasser class; (III) that there was no competent evidence to sustain a finding of wanton misconduct as against a trespasser; and (IV) that there was no competent proof that any act of wanton negligence was the proximate cause of Ormsbee's death. The Court of Appeals, responsive to the first point, held that there was a reasonable basis for the jury's finding of an "emergency." Consequently, the third



This last point is wholly without merit, was dealt with fully by the trial court in its opinion, and can be disposed of by this Court's order without the necessity of further proceedings below.<sup>15</sup> Consequently, a reversal with directions to reinstate the jury verdict is both the expeditious and proper disposition of this matter.

and fourth points were not considered because they became academic—Ormsbee was not a trespasser.

The second point (II) raised by respondent was that Ormsbee's exclusive remedy, if he was an emergency employee, was under the Workmen's Compensation Act. The Court of Appeals decided this point in favor of respondent.

The fifth point (V) was that the verdict was grossly excessive. This point is the only one which is not academic and which was not reached below.

<sup>15</sup> The contention that the verdict was grossly excessive is frivolous. The trial court dealt fully with the point in its opinion (R. 221a-223a). As was stated by the Third Circuit Court of Appeals, in *Scott v. Baltimore & O.R. Co.*, 151 F.2d 61, 65 (3d Cir. 1945):

"Judicial control of the jury's verdict in this kind of case is primarily for the trial court. *Dubrock v. Interstate Motor Freight System*, 3 Cir., 1944, 143 F.2d 304. A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."

The Third Circuit recently noted, in *Lebeck v. William A. Jarvis, Inc.*, 250 F.2d 285, 288 (3d Cir. 1957), that its authority is "very limited" and

"The sum of the matter is that we could not lawfully disturb this verdict if we would, and we would not, if we could."

The victim in the instant case was twenty years of age, with a long life expectancy. The Third Circuit recently sustained a verdict of

## CONCLUSION

For the foregoing reasons the petitioner prays that the judgment below be reversed and the jury verdict reinstated.

Respectfully submitted,

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\$80,000 for the death of a forty-seven year old hoist operator. *Thomas v. Conemaugh & Black Lick R.R. Co.*, 234 F.2d 429, 434 (3d Cir. 1956). And a verdict of \$93,655 was not deemed excessive by that court for the death of a twenty-seven year old driver of a bread truck whose previous year's earnings were \$3,000. *Wilson v. Nu-Car Carriers, Inc.*, 158 F.Supp. 127, 135 (M.D. Pa. 1958), *aff'd*, 256 F.2d 332 (3d Cir. 1958).

## APPENDIX

1. The United States Constitution, Amendment VII, provides:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

2. Rule 51 of the Federal Rules of Civil Procedure provides:

### “INSTRUCTIONS TO JURY: OBJECTION

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

3. Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22, provides:

“The term ‘employee’, as used in this act is declared to be synonymous with servant, and includes—

“All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer. Every executive officer of a corporation elected or appointed in accordance with the charter and by-laws of

the corporation, except elected officers of the Commonwealth or any of its political subdivisions, shall be an employe of the corporation."

Section 203 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 52, provides:

"An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

Section 302(b) of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 462, provides:

"After December thirty-first, one thousand nine hundred and fifteen, an employer who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, unless the employer shall post in a conspicuous place, upon the premises where the laborer's or assistant's work is done, a notice of his intention not to pay such compensation, and unless there be filed with the department within ten days thereafter, a true copy of such notice, together with proof of the posting of the same, setting forth upon oath or affirmation the time, place, and manner of such posting; and after December thirty-first, one thousand nine hundred and fifteen, any such laborer or assistant who shall enter upon premises occupied by or under control of such employer, for the purpose of doing such work, shall be conclusively presumed to have agreed to accept the compensation provided in article three, in lieu of his right of action under article two, unless he shall have given notice in writing to the employer, at the time of entering upon such employer's premises for

the purpose of doing his work, of his intention not to accept such compensation, and unless within ten days thereafter, there shall have been filed with the department a true copy of such notice, accompanied by proof of service thereof upon such employer, setting forth under oath or affirmation the time, place, and manner of such service. And in such cases, where article three binds such employer and such laborer or assistant, it shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed."

Section 427 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 872, provides:

"Any party may appeal from any action of the board on matters of the law to the court of common pleas of the county in which the accident occurred or of the county in which the adverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county of this Commonwealth: Provided, That no such appeal shall be taken to the court of common pleas of Allegheny County, but in Allegheny County all such appeals shall be taken to the county court of Allegheny County, which shall have exclusive jurisdiction of such appeals."



SUPREME COURT. U. S.

FILED

APR 11 1959

JAMES R. CROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 439

JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,  
*Petitioner,*

v.

AETNA FREIGHT LINES, INC.,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

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April, 1959.

# INDEX.

	PAGE
Question Presented .....	1
Constitutional Provisions and Statutes Involved ....	2
Statement .....	2
Summary of Argument .....	4
Argument .....	7
Conclusion .....	28

## CITATIONS.

### Cases:

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 .....	21
Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. 525 .....	5, 18, 19, 27
D'Alessandro v. Barfield, 348 Pa. 328, 35 Atl. 2d, 412...	25
Erie Railroad Co. v. Tompkins, 304 U. S. 64 .....	21
Guaranty Trust Co. of N. Y. v. York, 326 U. S. 113 ....	21
Herdman v. Pennsylvania Railroad Co., 352 U. S. 518 ..	36
Jacamino v. Harrison Motor Freight Co., 135 Pa. Superior Court 356, 5 Atl. 2d, 393 .....	10
Jaeger v. Sidewater, 366 Pa. 481, 77 Atl. 2d, 434: 8, 14, 17, 21, 23	
Klaxon v. Stentor Electric Co., 313 U. S. 1020 .....	21
Myers v. Reading Co., 331 U. S. 477 .....	20
Persing v. Citizens Traction Co., 294 Pa. 230, 144 Atl. 97 .....	21, 24
Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 .....	21
United New York and New Jersey Sandy Hook Pilots Association v. Halecki, _____ U. S. _____, 79 S. Ct. 517 .....	21

## II.

PAGE

### Constitutional Provisions and Statutes:

Federal Rules of Decision Act, 28 U. S. C. A. 1652 . . . .	2, 21
Section 104 of the Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 22 . . . . .	2
Section 203 of the Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 52 . . . . .	2
U. S. Constitution, Amendment VII . . . . .	2, 17

# Supreme Court of the United States

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JACKSON D. MAGENAU, Administrator of the Estate  
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*Petitioner,*

VS.

AETNA FREIGHT LINES, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

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## BRIEF FOR RESPONDENT

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### Questions Presented

In a diversity case, where Petitioner's evidence was to the effect that an unforeseen contingency had arisen during the transportation of a load of steel by a common carrier (Respondent), which made it necessary for the respondent's driver to engage petitioner's decedent to accompany respondent's driver for the remainder of the trip, in order to protect respondent's interests, and where that issue was specifically left to the jury's consideration after full, complete and unchallenged charge by the Court, has petitioner

been denied a jury trial when such jury finding, upon acceptance by a reviewing court, is applied to the law of Pennsylvania, the state where the cause of action arose?

Where there is no dispute between the parties to an action as to a particular factual question, must a party ask that additional instructions be given the jury particularly when the very factual question involved is included in a Special Interrogatory directed to the jury in language agreeable to both parties?

### **Constitutional Provisions and Statutes Involved**

The Constitutional provision which Petitioner alleges is involved in the Seventh Amendment to the United States Constitution. The statutes involved are the Pennsylvania Workmen's Compensation Act, Sections 104 and 203 (77 Purdon's Pa. Stat. Ann. Secs. 22, 52) and the Federal Rules of Decision Act (Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. A. 1652). The Seventh Amendment and the provisions of the Pennsylvania Workmen's Compensation Act are set forth in full in Petitioner's Appendix. The Federal Rules of Decision Act is as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

### **Statement**

This was a negligence action brought in the Federal District Court on the basis of diversity jurisdiction. Petitioner, as administrator of the Estate of Norman Ormsbee, Jr., brought suit against Respondent alleging that the latter was responsible for the death of said decedent because of



an accident which occurred on March 20, 1956 near Rochester, Pennsylvania.

Prior to that date, one Daniel Fidler, owner of the tractor-trailer, had leased the equipment to Respondent for use in its regular business of transporting freight under a permit from the Interstate Commerce Commission. On or about March 13, 1956, Respondent's driver, Charles Schroyer, picked up a load of steel at Syracuse, New York, which load was consigned to Crucible Steel Corp., at Midland, Pennsylvania. While enroute from Syracuse to Buffalo, Schroyer encountered tire trouble and also had had brake difficulty, which Respondent's superintendent at Buffalo had endeavored to adjust.

On the afternoon of March 20, 1956, Respondent's driver stopped at Jones' Tavern at Waterford, Erie County, Pennsylvania. There he talked to the tavern owner to whom he complained that he was having trouble with the brakes. A few minutes later, Petitioner's decedent and Herbert Brown entered the tavern. Schroyer offered Brown \$25 if Brown would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Petitioner's decedent to go on the trip for \$25.00, stating that he was having trouble with the brakes on the tractor and also on the trailer. Petitioner's decedent accepted the offer and the two got into the tractor. This was the last that they were seen alive. Later that evening, the Pennsylvania State Police received a call and in response thereto found the tractor-trailer over an embankment along the highway about four and one-half miles east of Rochester, Pennsylvania, and both men dead.

Petitioner's entire theory throughout the trial was to prove the facts set forth above surrounding the circum-

stances under which Petitioner's decedent came to be on the tractor. Petitioner asked the Trial Judge to charge on these facts which Petitioner presented and to further charge that if the jury accepted Petitioner's testimony, then the jury could find that an emergency arose which necessitated Respondent's driver in engaging Petitioner's decedent to accompany him for the remainder of the trip to protect Respondent's interests. This the Trial Judge did (R. 183a and 184a). In addition, the Trial Judge submitted special interrogatories, the first of which was exactly in accordance with Petitioner's theory as set forth immediately above. The jury answered this special interrogatory, saying, as Petitioner's theory was, that such an emergency had arisen and that the situation necessitated Respondent's driver in engaging Petitioner's decedent. The jury returned a verdict for Petitioner which the Trial Court refused to set aside. On appeal to the United States Court of Appeals for the Third Circuit, the Court, by Circuit Judge Goodrich, held that the special interrogatory was clear, and that the jury's answer thereto was clear and that such determination constituted Petitioner's decedent an employee under the substantive law of Pennsylvania. Therefore, the Court of Appeals held that under the jury's determination, Petitioner's sole remedy against Respondent was under the Pennsylvania Workmen's Compensation Act.

### Summary of Argument

#### I

Petitioner's evidence, Petitioner's theory, and Petitioner's requests for instructions, all were to a determination of the status of Petitioner's decedent while he was on Respondent's vehicle. Petitioner sought to establish that Ormsbee was hired by Respondent's driver to go along on the remainder of a trip involving the delivery of steel when

an emergency arose with respect to the operation of Respondent's vehicle which required the assistance of Ormsbee to protect Respondent's interests.

Respondent's position was that no emergency had occurred and that Ormsbee was a mere trespasser as to Respondent.

This factual dispute was clearly submitted to the jury under a clear Charge by the Court and a clear Special Interrogatory which asked the jury to determine whether an emergency did exist; whether such emergency made it reasonably necessary for Respondent's driver to secure the assistance of Ormsbee; and whether such assistance was needed to protect Respondent's interests. The jury answered all of these propositions in the affirmative. This was in exact accord with Pennsylvania law, as cited by Petitioner.

Such finding of the jury required the application of the Pennsylvania Workmen's Compensation Act as the only remedy available to Petitioner, because it met all of the tests required by the Pennsylvania cases cited hereinafter.

When the Court of Appeals held that the jury's holding required that Court to decide that Petitioner's only remedy was under the Pennsylvania Workmen's Compensation Act, it did not review the evidence to override the jury—it applied the jury's determination to the applicable law. This was in no way a violation of the principles laid down in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525 because the Court of Appeals did not re-evaluate the evidence to determine if the jury was right or wrong.

## II

There was no dispute between the parties nor the Court as to the business in which Respondent's vehicle was en-

gaged at the time of the accident. Ormsbee's presence was, as Petitioner's own counsel stated, to help in case of a breakdown, or to protect the load in case of a breakdown. Both of these matters are directly associated with Respondent's regular course of business, namely, transportation of goods by motor vehicle.

Since there was no dispute on this point, there was no need for Respondent to seek additional instructions to the jury. Petitioner knew that his evidence brought the employment of Ormsbee into direct play in the trial. If Petitioner felt that such employment was possible without causing his remedy to lie solely under the Pennsylvania Workmen's Compensation Act, Petitioner should have protected himself by seeking qualifying instructions. This Petitioner did not do.

On the other hand, Respondent did seek binding instructions to the effect that if the jury accepted Petitioner's view that Ormsbee was hired under the evidence, then the Workmen's Compensation Act would apply, but this request for instructions was denied, to which Respondent specifically excepted.

Finally, the question upon which Petitioner now alleges that Respondent should have sought additional instructions was actually submitted to the jury was embodied in the First Special Interrogatory when the jury was asked whether Ormsbee's assistance was needed to protect Respondent's interests. The only interests which Respondent had at the time of the hiring were with respect to his business purpose—transportation of goods. "Respondent's interests" were its regular course of business and jury affirmed that the hiring occurred therein.

## ARGUMENT

### I.

In adopting the jury's special finding which was based upon Petitioner's evidence, Petitioner's request for jury instructions and the Court's charge based thereon, the Court of Appeals did not usurp the federal practice of leaving disputed questions of fact to the jury for its determination.

Petitioner's position, as set forth in his brief, is that Petitioner was denied his rights to trial by jury in this diversity case when the Court of Appeals for the Third Circuit reversed a judgment of the United States District Court for the Western District of Pennsylvania. Petitioner argues that even though the Court of Appeals accepted the jury's determination on the basic factual issue involved, that Court could not apply the Pennsylvania law as to effect of the jury's determination.

The question of denial of jury trial was first raised by Petitioner in his Petition for a Writ of Certiorari. At no time, either during the argument before the Court of Appeals, in his brief filed with the Court, or in his motion for rehearing and the brief which accompanied it, did Petitioner raise the constitutional issue now being presented. The Court of Appeals at no time had any opportunity to examine Petitioner's present position nor to determine whether it applied to the circumstances of this case.

As a matter of fact, Petitioner's position with respect to Motion for Reargument directed to the Court of Appeals was a claim that that Court had no power to determine the applicability of the Pennsylvania Workmen's Compensation Act because, Petitioner asserted, that question was



strictly for the administrative agencies set up under that Act.

Because Petitioner in his present brief constantly maintains that it was Respondent which was attempting to establish a legal defense that the remedy of Petitioner was only under the Pennsylvania Workmen's Compensation Act, an examination of the Record must be made to demonstrate that it was Petitioner who was introducing the evidence on the point, who was proving an emergency or unforeseen contingency, who used that as his basis for proving the status of Petitioner's decedent on Respondent's tractor-trailer, who presented points for charge to like effect, and who did not except to the Court's charge with respect thereto. Petitioner's position was thusly taken because Respondent was maintaining that under applicable Pennsylvania law, a rider on an interstate carrier is a trespasser as to that carrier. *Jaeger vs. Sidewater*, 366 Pa., 481, 77 Atl. 2d, 434. Petitioner, therefore, sought to prove that Petitioner's decedent was a rider on the Respondent's unit because an unforeseen emergency had arisen which necessitated his presence in order to further Respondent's business interests—which were the transportation of goods in interstate commerce. The proof which Petitioner adduced and upon which Petitioner relied was as follows:

1. Witness Herbert L. Brown (R. 33a-44a)—This was Petitioner's first witness, and on direct examination Brown testified that Respondent's driver, Schroyer, stated in the Tavern that he was having trouble with the truck (R. 38a). Petitioner then proved through Brown that Schroyer offered \$25.00 to Brown to go along on the remainder of the trip. Brown refused the offer. Brown then testified that the same offer was made to Petitioner's decedent, who accepted. Brown was asked by Petitioner's counsel the rea-

son which Schroyer gave for making the offer. Respondent objected to this testimony as pure hearsay. Petitioner's counsel stated that the purpose of the testimony was (R. 36a):

"Mr. Gornall: Your Honor, we frame this question in this manner to show the intent, purpose and motive of Mr. Schroyer in offering employment to this man. We realize that it is hearsay, but it comes in under the—first of all, under the testimony of the man acting in the *course of his employment*, secondly under the *res gestae*, and thirdly, to show the intent, purpose and motive. I don't believe—

The Court: Intent and purpose and motive of what?

Mr. Gornall: To show the reason why this man hired Norman Ormsbee to go with him."

As Petitioner's counsel stated, and as the Court understood, and with which the Court agreed, this testimony was for the sole purpose of showing why Respondent's driver "employed" and "hired" Norman Ormsbee to go on the truck.

Further, as Petitioner's counsel asserted in order to make this testimony admissible, it was Petitioner's position that Respondent's driver's statements as to why he hired Ormsbee were made in the course of his employment as the Respondent's driver (R. 36a—Mr. Gornall); (R. 37a—The Court says that the statements of Schroyer were "in the *course of his employment*".)

2. Witness Charles Jones (R. 46a-61a)—This also was Petitioner's witness. Mr. Jones was also at the tavern when, as Petitioner alleged, Respondent's driver employed Ormsbee. Jones, on *direct* examination by counsel for Petitioner, testified that the offer of \$25.00 was made by Respondent's driver to Petitioner's decedent and that it was accepted. He, *over Respondent's objection*, was likewise permitted to testify that the reason why Respondent's driver asked Ormsbee to go along on the remainder of the

trip was because Schroyer was having brake trouble on the tractor and also on the trailer (R. 58a).

3. *Respondent*, on cross examination of the above two witnesses, sought to prove that Ormsbee had not been offered the \$25.00 because Schroyer needed the help of Ormsbee in the emergency which existed, but because Schroyer was merely trying to prove how much he made on a trip. Respondent's position remained constant, because if all Schroyer wanted with Ormsbee on the truck was to prove a brag as to how much he made on a trip, this would be strictly a personal reason of the driver, and Ormsbee would remain a trespasser as to Respondent. *Jacamino vs. Harrison Motor Freight Co.*, 135 Pa. Superior Ct., 356, 5 Atl. 2d, 393. But the jury, as the answer to the First Special Interrogatory clearly established, accepted Petitioner's theory of emergency and necessity for assistance (R. 199a), and did not accept Respondent's theory of Ormsbee being a rider for Schroyer's personal reasons.

4. Petitioner then continued to prove the factual basis for the application of the Pennsylvania emergency rule by the next witness, Adelbert Rice, Respondent's Buffalo Terminal Manager (R. 61a-70a). Through Rice, Petitioner proved that Schroyer had complained about his brakes on the day before the accident.

5. At the conclusion of Petitioner's case, Respondent moved for a compulsory dismissal on the ground that Petitioner had not established that Ormsbee was on the truck for any purpose of Respondent. Petitioner's counsel argued that he was, as follows:

(R. 113a):

"If the Court please, the case we have to deal with is Jaeger against Sidewater, cited in 366 Pa., 481. In that case we had a minor plaintiff, a boy who was in-

vited by the driver to get on the truck to assist him in making some deliveries, and then given a ride home, and the Court said that there is no implied authority to *hire* an assistant, there must be evidence of an unforeseen contingency, and it is impractical to communicate with the employer making the appointment necessary in order to safeguard the employer's interests."

(R. 114a):

"The question is whether *our evidence* in this case develops an unforeseen contingency or an emergency arising.

. . .

I think it is a legitimate inference, in view of the trouble he was having, he was fearful he was going to break down on the road, he needed somebody to give him help at that particular point."

(R. 115a):

"(Ormsbee was) To help in the case of a breakdown."

(R. 116a):

"You can understand for instance suppose the thing is wrecked, you have got a *valuable load* laying around a field in a storm, something like that, certainly a servant would have authority to engage a helper to help him protect, cover up with a tarpaulin."

(R. 117a):

"I think in this case *the jury* can infer he (Schroyer) wants help in case of a breakdown."

6. In the discussion between counsel and the Court relative to Respondent's motion for a compulsory dismissal, the Trial Judge stated (R. 119a) that he doubted whether Petitioner's counsel had established an emergency under the Pennsylvania case law but that he would leave it to the *jury* under special interrogatories.

7. At the conclusion of all of the evidence by both sides, the Petitioner presented certain requests for instructions. Petitioner's very first point for instructions was:

"An agent has implied authority to employ an assistant where an unforeseen contingency arises making it impractical to communicate with the agent's principal, and making the appointment of an assistant reasonably necessary for the protection of the interests of the principal entrusted to the agent; and if you find such to be the fact in the case, then Norman Ormsbee, Jr. would not be a trespasser upon defendant's vehicle."

The Court read this request for instructions to the jury and affirmed it as a correct statement of the law (R. 189a). Under this instruction, and as is shown later on with respect to the Court's charge, the Court left it to the jury to determine the factual issue presented by Petitioner's evidence—namely, did such an emergency exist? This was an instruction to the jury to determine whether Respondent's driver had implied authority under Pennsylvania law to employ an assistant because of the emergency.

8. In discussion between counsel for both parties and the Court with respect to the charge and the requests for instructions to the jury submitted by both sides, the Court was constantly of the opinion that there was insufficient evidence to go to the jury on the question of an emergency. But he finally did leave it to the jury by reason of the Charge and the First Special Interrogatory. The Charge was (R. 183a and 184a):

"Now as related to negligence, the Aetna Freight Lines, the defendant in the case, would not be responsible for want of care, for negligence, unless the decedent Mr. Ormsbee was in that truck with its permission, by its consent express or implied, and the law is that the driver can't give the consent, except in this case of emergency, and that is why this testimony brought



out on the part of the plaintiff to indicate there was such an emergency there that authorized, they think under the law, that would permit Mr. Schroyer to invite Mr. Ormsbee to complete the trip with him, but unless you find in this case that an emergency arose and it was such an emergency that Mr. Schroyer was unable to perform it alone, that is his duties for the continuance of the trip because of what has been brought out here, if you accept the proposition that the brakes were bad, and if that was the type of emergency then he would be privileged to take on this assistant Mr. Ormsbee. In that event, ordinary negligence if there was ordinary negligence, Mr. Ormsbee being free of contributory negligence would support a verdict for the plaintiff based on ordinary negligence, without any relation to Count 1, but again, except as the driver could confer such right, the plaintiff stood in no relation with the defendant whatsoever, the latter owed him no duty of protection. It is a rule universally recognized that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. It is upon the exception to this general rule which is quite as well settled as the general rule itself, that the plaintiff relies in this case to establish the relation of master and servant under this evidence. The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but you have to find an emergency on the road confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected in the interests of the employer that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him to complete the trip.

"With that I am going to mention the interrogatories to the jury. I am going to ask you to answer four questions. Number 1 relates to the proposition, 'Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the

decedent Norman Ormsbee to accompany him for the remainder of the trip?" and the words there 'unforeseen contingency' mean the emergency that I have just mentioned, the inability of Mr. Schroyer to cope with it alone. If you think it reasonable that he engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative."

9. Petitioner's theory that an emergency had arisen and that the jury could so determine was thus clearly left to the jury's determination by the First Special Interrogatory, which read (R. 184a and 185a):

"Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver, Charles Schroyer, engage the decedent, Norman Ormsbee, to accompany him for the remainder of the trip?"

This Interrogatory was solely and emphatically based upon Petitioner's own theory. It was based upon Pennsylvania substantive law as shown by *Jaeger vs. Sidewater, supra*. It left to the jury the disputed fact as to why and under what circumstances Petitioner's decedent came to be on Respondent's vehicle. The United States District Court did not decide this issue from an examination of the evidence. It left it to the jury. The Trial Judge explained to the jury what the meaning of the Interrogatory was and how it was to be applied to the evidence in the case by the jury, when, in his Charge, immediately after reading that Interrogatory, he charged (R. 185a):

"and the words there 'unforeseen contingency' mean the emergency that I have just mentioned, the inability of Mr. Schroyer to cope with it alone. If you think it reasonable that he (Schroyer) engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative."

The Court also devoted much time in charging the Jury as to when a servant has implied authority to engage an assistant and hence bind his master (R. 183a, 184a and 185a).

In summary, what the Court did here was to *leave to the jury* the factual determination whether or not an emergency had arisen, and whether that gave rise to implied authority on the part of Respondent's driver to engage an assistant. *The jury held that there was.*

But, Petitioner says, the jury was not asked to determine whether or not this employment of Ormsbee was in the regular course of the business of Respondent, and *because this was not asked*, the jury's verdict must be re-instated! Petitioner argues that this is so because otherwise, Petitioner says, he was denied jury trial when the Court of Appeals for the Third Circuit applied Pennsylvania law to the effect that the regular course of business of Respondent was the transportation of goods.

We have searched the Record for one single, solitary instance where Petitioner maintained that the activities of Respondent's driver and the purpose of Petitioner's decedent in being on the truck were not in the regular course of Respondent's business. On the contrary, Petitioner and the Trial Court at all times agreed that all activities of Respondent's driver and Petitioner's decedent were with respect to Respondent's business and interests.

At R. 166a, Petitioner's counsel, in discussing with the Court requests for instructions to the jury, and in arguing that there was sufficient evidence to go to the jury, had this to say:

"The Court: Here is the point of that. \*You have got this, I don't know whether even though it is hearsay, whether he can make Ormsbee an employee for compensation purposes without the consent of the employer even though he is an emergency; the cases say he can?"

Mr. Weber (Respondent's trial counsel): The cases as far as I found last night say if the circumstances

were met that it was necessary in the conduct of the employer's business and he becomes an employer (*sic*. employee).

Mr. Gornall: *In the ordinary conduct of his business.*"

Again, referring to R. 38a, where Petitioner's counsel was successful in getting hearsay statements of Respondent's dead driver into the record, the basis for Petitioner's position was that such statements were made by Respondent's driver in the course of his employment. Thus, it can easily be seen that Petitioner was constantly of the opinion that there was absolutely no dispute here that Schroyer was at all times in the course of his employment, and as reference to R. 166a shows, Petitioner's counsel always agreed that Ormsbee's employment was in the "ordinary conduct" of the Respondent's business.

Again, at R. 174a, Petitioner's counsel emphatically reiterated his position when he said:

"Made it reasonably necessary for the protection of the defendant's interests. *Defendant's interests*, not driver's interests."

Now, just what were defendant's interests which *Petitioner* constantly alluded to which were to be protected by the assistance of Ormsbee? Petitioner's witnesses did not specify the *exact* thing or things that Ormsbee was to do; but Petitioner constantly stated to the Court that the jury could infer it was for protection of the load, or help in the event of a breakdown. Both of these inferences, and, as a matter of fact, any inference growing out of Petitioner's evidence of trouble with brakes on the vehicle, were, and could be, only related to what the vehicle and its driver were doing on behalf of Respondent—transporting a load of steel. There is in this Record no argument by Petitioner's counsel at any place to the effect that Ormsbee's presence



on the vehicle was required other than in connection with transporting that load. Vehicles carrying cargo in interstate commerce was Respondent's regular course of business. Ormsbee, according to Petitioner, was brought on the vehicle because of an unforeseen contingency. Contingency connected with what, if not either the vehicle or its load or both? Petitioner argued at trial that Ormsbee's purpose in being on the unit was not personal to either him or to the driver—it was with respect to Respondent's interests. And whether the emergency required Ormsbee's presence to protect defendant's interests, was specifically submitted to the jury by the charge, the Petitioner's requests for instructions, and the Special Interrogatory. To say that because the Interrogatory didn't speak of Respondent's regular course of business instead of Respondent's interests, is a play on words—words which Petitioner at all times in this Record treated as identical. At no time in the Record was there any dispute between the parties or the Court as to whether Ormsbee's presence was required on the vehicle while it was on the regular business of Respondent. *The factual dispute was as to whether an emergency existed as defined by Pennsylvania law.* The Trial Judge held grave doubts as to whether there was sufficient evidence on this issue to go to the jury, *but he still left it to the jury.*

Thus, this question arises: Where the jury decided the factual issue in dispute, and such issue was determined by the jury after instructions admittedly based upon the applicable Pennsylvania law and in the language of the Pennsylvania Supreme Court case which establishes that principle (*Jaeger vs. Sidewater, supra*—cited to the Court by Petitioner as the applicable law, R. 114a), does a Reviewing Court violate the Seventh Amendment when it decides that the effect of that Pennsylvania substantive law must apply?



To put it another way, does a Federal Court have the power to apply the legal conclusion that follows from a jury's determination of a disputed finding of fact?

Petitioner says that *Byrd vs. Blue Ridge Rural Electric Cooperative*, 356 U. S., 525, decides that the Court has no such power.

In the *Byrd case, supra*, a negligence action was brought in the District Court for the Western District of South Carolina, on the basis of diversity of citizenship. The Respondent in that case raised the affirmative defense that the Petitioner's only remedy against that Respondent was under the South Carolina Workmen's Compensation Act. Petitioner did not, in any part of his case, introduce testimony attempting to rebut the affirmative defense. To have done so would have been anticipating a defense and undoubtedly would have been stopped by the Trial Judge. The Respondent, in its case, introduced evidence bearing on the affirmative defense. At the conclusion of the entire case, Petitioner moved the Court to strike the affirmative defense as not having been established under the law of South Carolina. This motion the Trial Court granted. Petitioner therefore did not introduce any rebuttal evidence to contradict the Respondent's evidence bearing on the affirmative defense. There was no need to—Petitioner's motion had been granted, and the affirmative defense had been stricken. Petitioner then received a verdict from the jury. After motion for new trial and judgment *n. o. v.* were refused, Respondent appealed to the Court of Appeals which, upon making an independent examination of Respondent's evidence bearing on the affirmative defense, reversed, and held that, as a matter of law, under appellate decisions of the South Carolina Supreme Court, the affirmative defense had been established, and that Petition-

er could not recover except under the South Carolina Workmen's Compensation Act. Upon certiorari being granted by this Court, it was held that a new trial was required because Petitioner had not been afforded an opportunity to rebut Respondent's evidence bearing on the affirmative defense and, then, the jury should decide the ultimate factual matters bearing thereon.

This Court said, at page 896, that one of the questions presented was whether that Petitioner, "state practice notwithstanding, is entitled to a jury determination of the *factual issues* raised by the defense". The defense had raised the question that, based on its evidence, which was not disputed by that Petitioner (because he was foreclosed by the Trial Court's striking of the affirmative defense), Petitioner was a "statutory employee" within the meaning of the South Carolina Workmen's Compensation Law. Respondent there maintained ~~that~~ he was barred because at the time of the injury he was ~~doing work of~~ the kind also done by the Respondent's own construction and maintenance crews. Whether Petitioner there was doing work of the kind which Respondent's crews did *was not submitted to the jury because the Trial Court struck out that defense upon its own interpretation of South Carolina law.* The Court of Appeals then held that the defense should have remained in the case and that, since under South Carolina law the Court decided whether the evidence sustained the defense or not rather than the jury, it would do likewise.

But, evidence surrounding the type of work of the Petitioner in *Byrd* was never submitted to the jury. If the evidence had been submitted to the jury and the jury had found by a special interrogatory that Petitioner was doing the same work as Respondent's crews, would the Court

of Appeals have been without authority to then say—  
 “That being what the jury decided, the remedy is under  
 South Carolina Workmen’s Compensation Law”?. The de-  
 cision in Byrd has no such language and no such import.

This Court has long recognized that the jury’s function  
 is to decide the *disputed* factual questions, and the Court  
 is to apply the jury’s factual determination to the applica-  
 ble law.

In *Myers vs. Reading Co.*, 331 U. S. 477, a plaintiff was  
 injured by an allegedly defective brake on a train. He  
 brought suit under the Safety Appliance Act. The Court,  
 by special interrogatory, asked the jury to determine  
 whether or not there was a defective brake. The *Trial*  
*Court* did not ask the jury to then say whether, if there  
 was a defective brake, that constituted a violation of the  
 Safety Appliance Act. This Court held that it would de-  
 termine only whether or not there was sufficient evidence  
 upon which the jury could determine that a defective brake  
 existed. The Court would then determine if, upon the  
 jury’s factual conclusion, such defective brake constituted  
 a violation of the Act.

That’s exactly what the Court of Appeals for the Third  
 Circuit did in this case. In the opinion written by Judge  
 Goodrich, he says at R. 231:

“Thus the matter turns in the final analysis on a  
 question of fact, that is, a sufficient state of emer-  
 gency to justify the enlisting of another to help as-  
 sist in the business to be done. The jury’s *finding* is a  
 forthright answer to a forthright question. The Trial  
 Judge who hear all the testimony was satisfied with it.  
 We do not think on this state of the record that we  
 would be justified in setting it aside.”

In other words, the Court of Appeals took the jury’s find-  
 ing and applied it. That Court did not review the evidence

to see whether there was evidence to sustain the jury's finding. The Court adopted it. By adopting it, the only result under Pennsylvania law was that Petitioner then had no course of action under Pennsylvania negligence law but only under Pennsylvania Workmen's Compensation Law.

*Erie Railroad Co. vs. Tompkins*, 304 U. S., 64, and the Rules of Decision Act (Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. A. 1652) require that the Court of Appeals make such application of Pennsylvania law. As recently as February 24, 1959, this Court in *United New York and New Jersey Sandy Hook Pilots Association vs. Halecki*, \_\_\_\_\_ U. S., \_\_\_\_\_, 79 S. Ct., 517, this Court, speaking through Mr. Justice Stewart, said: "We hold that the Court of Appeals was correct in viewing its basic task as one of interpreting the law of New Jersey." *A fortiori*, if the law of the state where the cause of action arises is settled in appellate court decisions, the federal courts are bound by that in diversity cases.

Thus, state statutes of limitations are binding on federal courts in diversity cases; and if the facts are not in dispute, the federal court applies the statute. *Guaranty Trust Co. of N. Y. vs. York*, 326 U. S. 113, and *Ragan vs. Merchants Transfer & Warehouse Co.*, 337 U. S. 530. Also, state conflict of law rules are binding. *Klaxon vs. Stentor Electric Co.*, 313 U. S., 1020. State Court interpretation and construction of state statutes are likewise binding upon federal courts in diversity cases. *Aero Mayflower Transit Co. vs. Board of Railroad Commissioners*, 332 U. S., 495.

Here, under *Persing vs. Citizens Traction Co.*, 294 Pa., 230, 144 Atl. 97 (1928), and *Jaeger vs. Sidewater*, *supra*, the law of Pennsylvania is clear that where an emergency



exists which requires the assistance of a person to protect the interests of the employer, that assistant has remedies only under the Pennsylvania Compensation Act. Here, the fact that assistance was required in the ordinary business of the Respondent was at no time disputed by Petitioner during the trial, but on the contrary, was, as heretofore discussed, asserted by them. As the Petitioner's request for instruction so clearly set forth to the jury—if an emergency existed, the jury could find that Respondent's driver "had implied authority to employ an assistant to protect defendant's (Respondent's) interests". "Defendant's interests" were the furtherance of the transportation of goods by motor vehicle. The jury's answer to the First Special Interrogatory was an unqualified "Yes". It adopted Petitioner's own theory of Pennsylvania law. The Court of Appeals didn't review this jury finding as Petitioner so strenuously argues. It adopted it. Such adoption caused the only result possible—a holding that under Pennsylvania law, Petitioner's remedy lay in workmen's compensation.

## II.

Since the Trial Judge left the disputed question of the status of Petitioner's decedent to the jury under instructions which were in exact accordance with Pennsylvania law, there was no need for Respondent to request additional instructions.

The second point discussed by Petitioner in his brief is divided into two parts—first, that if Respondent wanted a determination from the jury as to whether or not Ormsbee was an employee of Respondent, Respondent should have insisted upon additional instructions by the Court and another special finding from the jury; second, that since Re-



spondent did not seek such instructions, a new trial should not be ordered because such would be giving Respondent a second chance, to which it is not entitled!

There is absolutely no support for the first portion of Petitioner's position in the Record, and Petitioner completely fails to show where the Record is deficient. On the other hand, the Record clearly establishes that the Court's charge was proper. As a matter of fact, it was in exact accord with the position of Petitioner and his Requests for Instructions! It was, with respect to the disputed status question, based almost verbatim upon the principle of law which Petitioner wanted applied. It was in accordance with the language of the Pennsylvania Supreme Court in the case which Petitioner cited to the Court for his position, that is, *Jaeger vs. Sidewater, supra*.

As we have pointed out in previous argument, there was no dispute on any question relating to status, except as to the existence of an emergency justifying Ormsbee's employment. Petitioner argued there was. Respondent argued that there wasn't, and, hence, Ormsbee was a trespasser as to Respondent. What other disputed factual issued remained relative to Ormsbee's status?

Since *Petitioner* constantly contended that the emergency justified the employment of Ormsbee to protect defendant's interests—and those interests were only with respect to defendant's transportation of goods—there was no dispute on the issue of regular course of business. The Record certainly shows no dispute. Petitioner's position that the jury could infer that Ormsbee's presence under the emergency was either to aid in case of a breakdown of the vehicle, or to protect the load, are both the very fundamental elements of Respondent's regular course of business—transporting goods by vehicle. The test is what

Ormsbee was to do in his employment. No testimony was adduced by Petitioner to show that such employment was other than to protect the load or the vehicle in case of breakdown. Thus, no disputed issue was raised on this point. If no dispute did exist, there certainly was no need for additional instructions particularly when the special interrogatory was phrased to include a finding by the jury as to employment of Ormsbee to protect "defendant's (Respondent's) interests". The jury was not just asked to find whether an emergency existed. It was asked to find whether an emergency existed which made it reasonably necessary for the protection of Respondent's interests. The Court's charge likewise set this forth as a necessary element for the jury to determine. Therefore, when the jury answered that an emergency existed, it likewise answered that that emergency made it reasonably necessary to employ Ormsbee to protect Respondent's interests.

Petitioner's counsel was warned by the Court before the charge that they "were in a little bit of a dilemma" (R. 166a); further, that they wanted the jury to find that Schroyer hired Ormsbee—that they (Petitioner's counsel) were drawing themselves into the employee situation. Petitioner's counsel was therefore on notice of the effect of their own testimony and their own theory. But even with this warning, Petitioner's counsel, if they felt that because of their evidence and their theory it still didn't bring them within the holdings of the Pennsylvania Supreme Court, could have themselves sought further instructions from the Court and additional special findings from the jury. This they did not do. And the reason why is readily apparent.

Petitioner argued to the Trial Judge and later to the Court of Appeals that the holding of the Pennsylvania Supreme Court in *Persing, supra*, didn't apply because of

the case of *D'Allessandro vs. Barfield*, 348 Pa., 328, 35 Atl. 2d, 412. In other words, Petitioner wasn't disputing the fact that the charge of the Court was ample on the question of status, but they argued that the jury's finding didn't require the conclusion that the Workmen's Compensation Act applied because Ormsbee wasn't hired to perform services on Respondent's premises. Petitioner never once contested regular course of business. Petitioner did argue only that for the Workmen's Compensation Act to apply, the services had to be on-premises services.

Therefore, for Petitioner to now argue (for the first time) that regular course of business of Respondent was in dispute, just is not so. Since it never was in dispute, there was no need for the Court to charge any more than it did charge on the subject at R. 184a:

"The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but *you* (jury) have to find an emergency on the road (during transportation of goods) confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected in the *interests of the employer* that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him *to complete the trip* (again, transporting the goods to destination)."

Furthermore, Petitioner agreed that once the jury answered the First Special Interrogatory, the Court would apply Pennsylvania law. At R. 173a, the Court said that the "finding of trespasser is a conclusion of law". Petitioner's counsel said "the same as employees". This is a complete recognition by Petitioner's counsel that once the First Special Interrogatory was answered by the jury, that answer determined whether the conclusion of law that Ormsbee was a trespasser or an employee would follow.

The jury's affirmative answer called for the conclusion that Ormsbee was an employee. A negative answer would have called for the conclusion that he was a trespasser. Petitioner did not challenge this as correct—and it is correct.

No, Respondent had no duty or responsibility to seek additional instructions when it was patently clear that Petitioner's counsel, the Court and Respondent's counsel were all agreed that the jury's answer was all that was needed. For Petitioner to now say that he disagrees with that to which he did agree at trial and for that reason Respondent should have sought additional instructions, is truly after-thought. If anyone can be accused of "strategy", as Petitioner accuses Respondent of using during trial, it must be said that Petitioner has now adopted new strategy.

We further ask—could this jury have held on the evidence presented by Petitioner or Respondent that Ormsbee's employment was not connected with Respondent's regular course of business? What evidence does Petitioner point to upon which such a jury finding could ever be sustained? Absolutely none. Certainly, if a jury finds that an object is black, when every bit of evidence is that the object is white, a court can reverse that jury's finding as not being based upon a scintilla of evidence. This Court has very recently recognized that even in Federal Employer Liability Cases, the Appellate Courts can examine the record to see if there is any evidence to support a jury's verdict. *Herdman v. Pennsylvania Railroad Co.*, 352 U. S. 518. Therefore, since there was no evidence disputing the fact that Ormsbee's employment was with respect to transporting goods in commerce, a jury's holding to the contrary could never stand.



Petitioner's final point that the mandate of this Court should be to reinstate the verdict is wholly without merit. Petitioner advances this as the solution to the problem on the ground that Respondent failed to seek a necessary instruction and having failed to do so, Respondent must be punished.

As we have pointed out above, no such additional instructions were required in this case. Assuming that they were, we maintain that the least that should be done is to remand the case to the Court of Appeals for its determination of the other issues not discussed by it in its opinion because the Court of Appeals decision made such discussion unnecessary, or in the alternative a new trial should be granted. This is not "second chance"—this is not abusing the orderly administration of justice. On the contrary, if *Byrd* does apply to this case, a new line of demarcation has been created by that case in the handling of judge-jury questions, and both parties should, in the interests of equal justice, have the case presented to a judge and jury with the new limits in mind.

This latter point, however, we maintain is not the remedy called for. We maintain that the review of the case as made by the Court of Appeals is the only correct one. Petitioner has himself recognized that a remedy exists to him even in view of the decision of the Court of Appeals. He has filed a Petition for Workmen's Compensation which is still pending. The holding of the Court of Appeals merely affirms that under Petitioner's own facts and theory, that is where his remedy properly lies.



**CONCLUSION**

**For the reasons set forth above, the judgment of the Court of Appeals for the Third Circuit should be affirmed.**

Respectfully submitted,

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SUPREME COURT. U. S.

No. 439

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# Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

*v.*

AETNA FREIGHT LINES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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APRIL, 1959.

# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 439

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE  
OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

*v.*

AETNA FREIGHT LINES, INC., *Respondent*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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## REPLY BRIEF FOR THE PETITIONER

Boiled down to essentials, respondent's Brief rests on three erroneous claims.

1. Respondent asserts that Interrogatory 1 presented the entire Compensation Act issue for jury determination. Interrogatory 1 referred to protection of the "defendant's interests." These words—"defendant's interests"—are said to have the same meaning as the "regular course of the business" of respondent. Indeed, respondent states, at p. 17 of its Brief, that to deny that this is just another way of saying the same thing, is "a play on words."

Respondent must be painfully aware that it can hardly claim that the jury has decided the Compensation Act issue in *respondent's* favor when the jury re-

turned a verdict for *petitioner*, and when respondent neither sought nor obtained an instruction on the essential element of its secondary defense. Even if Ormsbee served as respondent's employee, rather than as Fidler's, petitioner's cause of action is not defeated unless Ormsbee was its employee "in the regular course of the business." So, if the jury was to make the essential determination, this statutory language should have been presented and explained to the fact-finder. And obviously the party relying on the Compensation Act to defeat the cause of action must seek the needed jury instruction. *Palmer v. Hoffman*, 318 U.S. 109, 119.

Since the jury never heard of the Compensation Act as a ground for defeating the cause of action, and never heard of the statutory language "regular course of the business," respondent now searches for a substitute. The substitute chosen is the words "defendant's interests," which appeared in Interrogatory 1.

This is indeed a new statutory test for "regular course of the business." Under this suggestion, anything that serves the employer's "interests" is in the regular course of his business. Of course there is no support for this interpretation in the decision of the court below, and none in the decisions of the Pennsylvania courts. If everything that furthered the employer's "interests" were in "regular course," what would be excluded?

In *Callihan v. Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), relied on by the court below, the necessary repair of machinery was held not to be in the regular course of business. Was not this repair in the "interests" of the employer? The court recognized the obvious fact that this repair work was essential, but concluded it was not in the regular course of the business.

*Ciccocioppo v. Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953), similarly relied on by the court below, involved necessary repairs to defendant's restaurant ceiling. Such repairs were held not to be in the regular course of defendant's business. Yet these repairs were in defendant's "interests." And in *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939), the removal of an injured employee from the power lines by an emergency employee was held not in regular course, though obviously in the employer's interest, since this made possible the restoration of electric current.

No one, as far as an examination of the Pennsylvania cases reveals, has heretofore even suggested an equivalency between what is in the employer's interests and what is in "regular course of the business." Respondent can find no comfort in Interrogatory 1 in concluding that there was presented to the jury the question of "regular course."

The Court of Appeals made no claim that the issue of regular course of business had been presented for a jury determination, but decided the question as one of law. Respondent made no such claim in opposing certiorari, and the absence of such a claim was duly noted in petitioner's Reply Brief, at p. 2. This presumably has spurred respondent's present effort to supply the omission.

2. Throughout its Brief (e.g., pp. 16, 23, 25), respondent asserts that there was "no dispute" as to Ormsbee's employment status. It is asserted that petitioner somehow freely conceded that respondent was Ormsbee's employer, and that the employment was in "regular course." This is an amazing and wholly tortured contention. Only the persistence with which it is advanced necessitates a brief rebuttal.



While the claim of "no dispute" is advanced to brush Fidler aside as the employer, it is advanced most ardently to justify the failure of respondent to seek a jury determination on the issue of "regular course of the business." The claim of "no dispute" is also used to create the impression that petitioner first raised this issue in this Court. Respondent's argument includes a wholly erroneous interpretation, at p. 16 of its Brief, of what petitioner's trial counsel stated to the trial judge as to "ordinary conduct" of the employer's business. Respondent's argument reaches its crescendo, at p. 25 of its Brief, when it categorically asserts that in the courts below, "*Petitioner never once contested regular course of business,*" and petitioner "now argue[s] (*for the first time*) that regular course of business of Respondent was in dispute."

If the issue was not disputed below, why did the Court of Appeals have to rule on the question? Petitioner's brief in the court below summarized his position on Workmen's Compensation as consisting of three points. The first was that Fidler, or Schroyer as Fidler's agent, was the employer; the third was that "Ormsbee's employment was casual and not in the regular course of Aetna's business."<sup>1</sup> These points were then fully argued by petitioner. Unlike here, respondent below made no claim that the employment status point was not in dispute. It acknowledged petitioner's position—which it now asserts was never advanced—by this summary statement in its brief below: "*Plaintiff contends that Ormsbee's employment was not in the regular course of defendant Aetna's business. . . .*"<sup>2</sup>

<sup>1</sup> Brief for Appellee in Court of Appeals, pp. 14-15.

<sup>2</sup> Reply Brief for Appellant in Court of Appeals, p. 3.

Respondent, at pp. 15-16 of its Brief, quotes the record at R. 166a as showing petitioner's purported agreement that Ormsbee's employment was in the "ordinary conduct" of respondent's business. In fact, the record shows exactly the opposite. The Compensation Act issue was being discussed with the court. Mr. Knox, counsel for petitioner, referred to a "casual helper," which was a reference to the language of Section 104 of the Act. R. 166a. After counsel for respondent advised the court that emergency employees were covered by the Compensation Act, Mr. Gornall, also counsel for petitioner, added the qualification that the employee had to be engaged "in the ordinary conduct of his business." "Ordinary" means "regular" under the established decisions interpreting Section 104 of the Act. Thus Mr. Gornall was raising the same contention that respondent asserts was urged for the first time in this Court.

Understanding of this case is not furthered by an erroneous repetition of the theme that petitioner conceded that which respondent reserved for the court's consideration, rather than the jury's. Respondent says nothing of the testimony of its own regional manager that *Fidler* was *Schroyer's* "boss" (R. 64a). This admission by a witness apparently is not considered a concession, for throughout its Brief it systematically refers to *Schroyer* as "respondent's driver." Rather than deal with the facts, respondent simply asserts there was "no dispute," and fortifies this approach by assuming that all the facts were resolved in its favor.

3. Finally, respondent endeavors to escape *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, by claiming that the Court of Appeals merely accepted the jury's finding, and then applied the law.

Respondent makes no effort to explain why the Court of Appeals relied on **SKINNER**, a treatise on the Pennsylvania Workmen's Compensation Act, and a supporting Pennsylvania decision in determining the scope of review. This reliance was hardly necessary if all facts and inferences were already determined below by the jury. Respondent offers no explanation for the court's reliance on state practice.

The Court of Appeals did approve the jury finding that there was an emergency situation and that Ormsbee was consequently not a trespasser. R. 231. But the evidence would certainly have permitted a jury inference that Ormsbee's functions, which were in respondent's interests so that he was not a trespasser as to it, were to be performed for Fidler, who maintained his own equipment now on the verge of breaking down. Moreover, as we have seen, the evidence would have supported the inference that Ormsbee's employment was not in "regular course."

This Court on April 6, 1959, in deciding *Baker v. Texas and Pacific Railway Co.*, No. 363, Oct. T. 1958, held that the issue of who is an "employee," or "employed," should be submitted to the jury because it "contains factual elements," just "like that of fault or of causation." See also petitioner's main Brief, p. 17, for similar precedents.

The court below resolved factual elements on which reasonable men could differ. It did so in reliance on state practice. It did so although the jury had never been advised that the Compensation Act was being relied on by respondent to block recovery—and even though the jury had never been instructed on the applicable standard, a procedure which would be elementary under the federal practice of submitting the issue to the jury.

Respondent had adequate strategic reasons for the posture in which it left its defense before the jury. It cannot seek to relitigate the matter now. *Palmer v. Hoffman*, 318 U.S. 109, 119.

#### CONCLUSION

For the foregoing reasons the petitioner prays that the judgment below be reversed and the jury verdict reinstated.

Respectfully submitted,

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APRIL, 1959.

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**SUPREME COURT. U. S.**

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# Supreme Court of the United States

OCTOBER TERM, 1958

**No. 439**

**JACKSON D. MAGENAU**, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,  
*Petitioner,*

**v.**

**AETNA FREIGHT LINES, INC.,**  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

## REPLY BRIEF FOR RESPONDENT

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**April, 1959.**



# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 439

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JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,  
*Petitioner,*

v.

AETNA FREIGHT LINES, INC.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

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## REPLY BRIEF FOR THE RESPONDENT

### I.

1. Both in his main brief and reply brief, Petitioner totally misconceives Respondent's position in the following essential respect: Granting that ordinarily the defense that plaintiff was an employee of the defendant and hence relegated to his Workmen's Compensation remedies would be an affirmative defense in a diversity action based on negligence, here *Petitioner* abandoned his original theory of "guest passenger" set forth in his Complaint, and, at the trial proved all of the circumstances giving rise to the emergency hiring of decedent Ormsbee in order to escape

the consequences of his being held a trespasser as to Respondent.

Therefore, Petitioner elected as part of his own case, to show all of the circumstances surrounding how Ormsbee came to be on the truck, namely, that he was hired for \$25.00; that the hiring was necessitated by an emergency—past mechanical and brake trouble and the expectation of more—that the hiring was in the furtherance of Defendant's interests; and that Ormsbee was employed as the driver's helper or assistant, not for just a few minutes, but for the whole balance of the trip.

Admittedly the first interrogatory submitted to the jury did not contain all of the foregoing facts, but it must be considered in the light of the Trial Judge's explanation and instructions at the time he submitted it. In accordance with Federal Rule 49(b) the Court gave such explanation and instruction with reference to the first interrogatory—the same appearing at page 184 of the Record and printed on pages 13-14 of Respondent's main brief.

In short, the jury was expected to consider the following elements when answering the first interrogatory as explained by the Court: Whether Ormsbee was hired in the furtherance of Defendant's interests by reason of unforeseen emergency of such a nature that Schroyer was unable to perform his duties for the continuance of the trip; that only in such event could Schroyer engage an assistant for the remainder of the trip.

Accordingly it is Respondent's position that Petitioner, in proving the circumstances surrounding the emergency employment of Ormsbee likewise proved the factual basis of such emergency employment being in the regular course of Respondent's business, as to which there was no dispute,

since all of the evidence thereof was submitted by Petitioner.

The Trial Court clearly showed that he sensed Petitioner's difficulty, when he stated, at the time of requests for instructions, to Petitioner's counsel (166a):

"You fellows are in a little bit of a dilemma. You want the jury to find he hired him or engaged him, therefore you touch, you draw yourselves near to this employee's situation, see."

Accordingly, we submit that Judge Goodrich was correct when he said:

"We cannot escape the conclusion that the *finding* that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all."

2. In his reply brief, Petitioner states:

"Respondent makes no effort to explain why the Court of Appeals relied on Skinner \* \* \*"

But that Court likewise relied on *Callihan vs. Montgomery*, 272 Pa., 56, where the Supreme Court said, at page 62:

"Whether on the *state of facts found*, he (plaintiff's decedent) was killed in the course of his employment, and also whether the employment was 'casual in character and not in the regular course of the business of the employer' within the meaning of these several phrases as used in the Act, are questions of law, and, as such, open to review."

Accordingly, Respondent reiterates that what the Court of Appeals did upon review, was not to ignore the jury's finding, but to hold that it was predicated upon a factual basis sufficient, as a matter of law, to constitute an emergency hiring in the regular course of Respondent's business.

In view of the liberal interpretation of the Workmen's Compensation Act, it would be anything but equitable that

a helper engaged to assist a regular driver in the performance of his duties for the balance of a trip would not be entitled to workmen's compensation benefits, but that only the regular driver would be. Unquestionably this would be most strongly urged by Petitioner's counsel if a like finding in favor of one occupying the status of decedent Ormsbee, were being objected to by Respondent in a workmen's compensation proceeding.

3. At all times prior to the petition to this Honorable Court, Petitioner has contended only that, *as a matter of law* (on the basis of certain authorities cited by Petitioner and rejected by the Court of Appeals as inapposite), Ormsbee's employment was not in the regular course of Respondent's business. Petitioner has heretofore not contended that the jury was not permitted to pass on the factual basis for "regular course".

In fact, throughout the trial, Petitioner's counsel wholeheartedly agreed with the Trial Judge that the applicability of the Workmen's Compensation Act was solely a question of law (see Record, 61a, and 173a).

## II.

In his reply brief Petitioner stresses the fact that "The jury had never been advised that the Compensation Act was being relied on by Respondent to block recovery." But, as heretofore noted, at the trial Petitioner was perfectly satisfied in that regard, for the record shows (195a) that at the conclusion of the Court's charge Mr. Gornall, on behalf of Petitioner, stated: "We have no corrections or objections, your Honor."

Respondent, on the other hand, specifically sought to bring the applicability of the Workmen's Compensation

Act before the jury by its Seventh Point for charge, the refusal of which was specifically excepted to by Respondent (197a).

The aforesaid request for charge by Respondent (appearing in the certified record before this Court at page 2 of Appellant's (Respondent's) Answer to Appellee's (Petitioner's) Petition for Rehearing and Stay of Mandate) reads as follows:

*"If you find that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc. and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."*

The Court of Appeals, by its decision in this case, has already determined that the foregoing point (which required a *factual* determination by the jury) correctly states the Pennsylvania law; and this Court has frequently stated that the basic task of Courts of Appeal is to interpret state law.

After excepting to the refusal of its point, what possible additional instructions could Respondent have submitted? It is submitted that whether an activity was in the regular course of an employer's business, could not be more clearly submitted to a jury in laymen's language than by an inquiry as to whether it was the type of work a regular employee was required to do.

Furthermore, the Trial Judge clearly showed that he understood Respondent's position when he stated, immediately after refusing Respondent's remaining points (including the 7th) (166a):



"I am not going to speak on Workmen's Compensation. I don't think Workmen's Compensation has anything to do with this case. If they find it was necessary to hire him—well, wait a minute; I am not going to say anything."

On the basis of the very authorities cited by Petitioner, he, not having excepted to any part of the Court's charge, should not be entitled to a new trial.

In the final analysis, Respondent submits that the controlling point in this case is that Petitioner, in his own proof, established the factual basis of emergency employment in the regular course of Respondent's business. Consequently, Respondent contends that the situation is exactly analogous to one where a plaintiff's own case discloses his contributory negligence. Certainly, such a plaintiff cannot sustain a jury's verdict in his favor on the ground that contributory negligence is an affirmative defense and defendant failed to prove plaintiff's contributory negligence by defendant's evidence. Here, Petitioner, having proved the factual basis for application of the Workmen's Compensation Act, should bear the consequences; although the holding of the Court of Appeals may be of immeasurable benefit to other workmen's compensation claimants and also to Petitioner here, inasmuch as Petitioner's claim for workmen's compensation is still pending.

Respectfully submitted,

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